Supreme Court, U.S.
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No. 06-985

IN THE

Supreme Court Of The United States

LYNETTE M. PETRUSKA,

Petitioner,

—versus—

GANNON UNIVERSITY, et al.

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the First Amendment nullifies neutral, generally applicable federal anti-discrimination laws against gender and retaliatory discrimination in employment where the religious employer's conduct is not religiously motivated.

2. Whether an employer's decision to discriminate against a member of the clergy on the basis of gender or protected activity must be based on a sincere religious belief in order to avoid application of federal anti-discrimination laws.

3. Whether a religious employer waives a ministerial exception to Title VII if it represents itself as an "equal opportunity" employer or takes government funds conditioned on observing the federal anti-discrimination laws.

PARTIES TO THE PROCEEDINGS BELOW

The parties in the United States Court of Appeals were as follows:

Plaintiff-appellant: Lynette M. Petruska

Defendant-appellees: Gannon University; The Board of Trustees of Gannon University; William I. Alford, II; Robert H. Allshouse; Joseph F. Allison; Michael P. Allison, Rev.; James A. Baldauf; L. Scott Barnard; George J. Behringer; Arnold E. Bergquist; Lawrence E. Brandt, Rev. Msgr.; Robert L. Brugger, Rev. Msgr.; Donald M. Carlson; Daniel C. Carneval, D.O.; Stephanie Domitrovich, Hon.; Thomas L. Doolin; James J. Duratz; Antoine M. Garibaldi; Thomas C. Guelcher; William M. Hilbert, Sr.; Brian J. Jackman; James W. Keim, Jr.; Mary Rita Kuhn, Sr., SSJ; Thomas J. Loftus; Anne C. McCallion; Joseph T. Messina; Michael J. Nuttall; John E. Paganie; Denise Illig Robison; James J. Rutkowski, Jr.; James A. Schaffner; Helen M. Schilling, M.D., D.D.S.; John M. Schultz, Very Rev.; Robert J. Smith; Rev. Msgr.; Lawrence T. Speice, Rev. Msgr.; William C. Springer; James G. Toohey; Donald W. Trautman, Bishop; Anastasia Valimont, Sr. SSJ; Ricarda Vincent, Sr. SSJ; Melvin Witherspoon; All Other Known and Unknown Members of the Board of Trustees of Gannon University During the Tenure of Donald W. Trautman, as members of the Board of Trustees of Gannon University; David Rubino, Msgr., in their individual and official capacities; Nicholas Rouch, Rev., in their individual and official capacities.

Parent and Subsidiaries: None

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JURISDICTION

The Third Circuit decision was reached on September 6, 2006; the petition for rehearing en banc, which was treated by the Third Circuit as a petition for rehearing, was denied on Oct. 18, 2006. This Court has jurisdiction of this appeal under 28 U.S.C. § 1254 (2006).

STATUTES INVOLVED

Civil Rights Act of 1964, 42 U.S.C. § 2000e (2006), reprinted in the Appendix, *infra*, at App 135.

STATEMENT OF THE CASE

This case comes to the Court on a Fed. R. Civ. P. 12(b)(1) motion, which was treated as a 12(b)(6) motion, and,

therefore, Petitioner's allegations in her complaint must be treated as true. *Anza v. Ideal Steel Supply Corp.*, 126 S. Ct. 1991, 1994 (2006).

FACTS

According to the complaint, Petitioner Lynette Petruska, a Sister of St. Joseph at the time of the acts complained of, was hired by Gannon University, a Catholic diocesan college located in Erie, Pennsylvania, to serve as the university's Director of Social Concerns. At that time, Reverend Nicholas Rouch was serving as the University Chaplain, but was headed to Rome for study. He was promised that he could resume as University Chaplain upon his return, and during the subsequent two years, the position of University Chaplain was filled by an interim chaplain. Then-President David Rubino then promoted Petitioner to fill the position of University Chaplain on a purportedly permanent basis. When Petitioner expressly asked for assurances that she would not be replaced by Rouch, Rubino promised her that she would not be replaced by Rouch.

Following allegations of sexual harassment, Rubino formally resigned as President of Gannon University. Petitioner was serving on the university's Sexual Harassment Committee at the time and was instrumental in bringing forward the claims against Rubino. After Rubino's resignation, Petitioner was appointed Chair of Gannon's Institutional Integrity Committee, where she helped draft a report critical of the university's policies and procedures related to discrimination and harassment. She also complained to the bishop/Chairman of the Board about a priest who had been removed for misconduct involving students, who had regular contact with students on campus.

When Rouch returned from Rome, he was given a newly created position entitled, Vice President for Mission and Ministry, which had no job description. At the same meeting, Bishop Trautman instructed then-Acting President Thomas Ostrowski that Petitioner was to be removed as University Chaplain and her duties were to be transferred to Rouch. When asked, Ostrowski conceded that the decision was made solely on the basis of her gender. President Ostrowski delayed her dismissal and suggested she take another position at Gannon University, and then was later removed from the list of those to be considered for the position of University President.

Dr. Antoine Garibaldi was appointed President of Gannon University, and shortly thereafter limited Petitioner's responsibilities and instructed her to limit her comments at university events. A year later, on August 21, 2002, Garibaldi informed Petitioner that her position would report directly to Rouch. Petitioner informed Garibaldi that she knew the decision was being made solely on the basis of gender and filed a grievance with the University Review Council, but on August 28, 2002 she was notified by the council that it was not the proper forum for her complaint.

Rouch contacted Petitioner and indicated he wanted to discuss restructuring her duties, but she refused to meet with him until after her concerns involving gender discrimination had been addressed by Garibaldi. The next day, Ricarda Vincent, the president of her community, informed her that she was forbidden to take any action versus Gannon University or to speak publicly about Gannon's discriminatory conduct. This warning came after Bishop Trautman contacted Vincent regarding Petitioner's situation.

Rouch then contacted Petitioner regarding restructuring her department. Petitioner sent an email response to Garabaldi noting that she had not received an answer to her request for a meeting regarding the gender discrimination. The next day, Garibaldi responded to her email, indicating that the university would take appropriate action if she did not report to Rouch. Then, under the belief that she was about to be fired, Petitioner tendered her resignation with two weeks notice. The following day, Rouch and Bob Cline, Human Resources Director for Gannon University, informed Petitioner that her resignation would be accepted effective immediately.

REASONS TO GRANT THE WRIT

This case involves a crucial First Amendment issue that directly affects the day-to-day decisions of religious organizations and their clergy, the scope of which has split lower courts and which this Court has never addressed. It pits a claim to complete autonomy from the law for religious entities against the right of employees not to be discriminated against. In the past thirty years, a number of federal appellate and state supreme courts have limited the reach of Title VII, the federal anti-discrimination law that governs private employers, 42 U.S.C. § 2000e et seq., when applied to religious employers. Title VII prohibits those employers who employ fifteen or more persons from discriminating against employees on the basis of race, color, religion, sex, or national origin and further prohibits retaliation for engaging in protected activity. 42 U.S.C. § 2000e-2. During Title VII's enactment, the members of Congress considered exempting religious employers completely from the anti-discrimination laws, but decided against such wholesale exemption. 110 Cong. Rec. 12818 (1964) (statement of Sen.

Humphrey). Instead, Title VII, as enacted, exempts religious employers only from the prohibition on discrimination according to religion. 42 U.S.C. § 2000e-1(a).

Congress later expanded the scope of the exemption beyond clergy to permit religious discrimination against any employee, Pub L. 92-261, 86 Stat. 104, which was upheld in this Court's decision in *Corporation of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 329-30 (1987).

Thus, from the inception of Title VII, Congress intentionally left religious entities subject to the compelling public law against racial, gender, and national origin discrimination — when the decision was unrelated to the religious belief of the employee. A significant number of federal appellate and state supreme courts have concluded in the interim, however, that Congress's legislative accommodation is inadequate and that the First Amendment mandates accommodation for clergy beyond Title VII's statutory exemption. They have crafted what has come to be called the "ministerial exception."

Starting with the 1972 decision in *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972), a significant number of federal appellate and state supreme courts have read the First Amendment to necessitate a comfort zone around religious entities to discriminate against their clergy on the basis of race, gender, and national origin, even when the decision is motivated by invidious discrimination and not religious belief. The same is true with respect to retaliation for engaging in protected activity that is unconnected to religious belief.

Despite the thirty-year development of this First Amendment doctrine with wide effect, this Court has yet to take a case addressing the judicially created "ministerial exception" to Title VII.[1] The result is that there is significant confusion among courts regarding the constitutional necessity of such a "ministerial exception," and, if it is constitutionally required, its appropriate scope.

There is no better case to illustrate the confusion over core issues under the "ministerial exception" than this one, because this case led to two appellate opinions reaching startlingly opposite conclusions.

The first opinion in this case, which carefully calibrated the needs of religious entities in light of Title VII's mandate of employer nondiscrimination, interpreted the ministerial exception narrowly and in favor of Petitioner, was written by Judge Edward R. Becker. *See* Appendix at App. 30. Judge Richard Nygaard joined Judge Becker's opinion and Judge D. Brooks Smith dissented. Following Judge Becker's death, and the recusal of Judge Nygaard, the United States Court of Appeals for the Third Circuit withdrew the Becker opinion and formed a new panel, which included Judge Smith, and two other randomly chosen judges, Judges Robert E. Cowen and Morton I. Greenberg. Judge Smith, writing for the panel,

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[1] It is not that the Supreme Court has not been asked to hear such cases. Rather, this Court routinely has denied certiorari. *See, e.g., Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036 (7th Cir. 2006), *cert. denied*, 127 S. Ct. 190 (2006); *Starkman v. Evans*, 198 F.3d 173 (5th Cir. 1999), *cert. denied*, 531 U.S. 814 (2000); *Young v. N. Ill. Conf. of United Methodist Church*, 21 F.3d 184 (7th Cir. 1994), *cert. denied*, 513 U.S. 929 (1994); *Rayburn v. Gen. Conf. of Seventh-Day Adventists*, 772 F.2d 1164 (4th Cir. 1985), *cert. denied*, 478 U.S. 1020 (1986); *McClure*, 460 F.2d 553, *cert. denied*, 409 U.S. 1050 (1972).

ruled that the First Amendment requires absolute immunity for religious entities from any claim of discrimination or retaliation under Title VII brought by clergy. *See* Appendix at App. 1.

While both panels applied existing federal law to the same facts, the similarities in the two panel approaches end there. When a single federal appellate court can apply radically different approaches to a single case, and reach opposite holdings — over thirty years after the doctrine was first introduced — the time has come for this Court to clarify the law. Clergy, religious institutions, and courts need this Court's guidance on the meaning and impact of this Court's relevant First Amendment doctrine in cases involving neutral, generally applicable civil rights laws as they apply to members of the clergy.[2]

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[2] The breadth of the definition of "clergy" under the ministerial exception has been a matter of some confusion among lower courts. *See, e.g.*, *Rweyemamu v. Comm'n on Human Rights & Opportunities*, No. AC 27108, 2006 Conn. App. LEXIS 509, at *13 (Conn. App. Ct. Dec. 12, 2006) ("[T]he exception applies only to the employment of ministers and clergy broadly defined."); *Patsakis v. Greek Orthodox Archdiocese of Am.*, 339 F. Supp. 2d 689, 694-95 (W.D. Pa. 2004) (*Starkman* "primary duties" test did not lead to finding an administrative vicar a minister in spite of heavy involvement in church administration); *Miller v. Bay View United Methodist Church, Inc.*, 141 F. Supp. 2d 1174, 1181 (E.D. Wis. 2001) (defining choir director as a minister because her primary duty was spreading the faith and participating in religious ritual and worship).

I. THERE IS SIGNIFICANT UNCERTAINTY REGARDING THE EXISTENCE AND SCOPE OF A "MINISTERIAL EXCEPTION" TO TITLE VII AMONG FEDERAL APPELLATE COURTS AND STATE SUPREME COURTS

After the issue has percolated for over thirty years, there are three dominant approaches to the ministerial exception theory (though with a variety of permutations). In general, courts have taken the following approaches:

(1) **recognized a ministerial exception that grants religious employers absolute immunity from civil rights laws,** *see, e.g., Alicea-Hernandez v. Catholic Bishop of Chi.*, 320 F.3d 698 (7th Cir. 2003) (holding that the ministerial exception precludes any inquiry into reasons behind church's ministerial employment decision). *See also Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036 (7th Cir. 2006); *Werft v. Desert Sw. Annual Conf. of United Methodist Church*, 377 F.3d 1099 (9th Cir. 2004); *Gellington v. Christian Methodist Episcopal Church, Inc.*, 203 F.3d 1299 (11th Cir. 2000); *Starkman v. Evans*, 198 F.3d 173 (5th Cir. 1999); *Combs v. Cent. Tex. Annual Conf. of the United Methodist Church*, 173 F.3d 343 (5th Cir. 1999); *Bell v. Presbyterian Church*, 126 F.3d 328 (4th Cir. 1997); *E.E.O.C. v. Catholic Univ. of Am.*, 83 F.3d 455 (D.C. Cir. 1996); *Young v. N. Ill. Conf. of United Methodist Church*, 21 F.3d 184 (7th Cir. 1994); *Scharon v. Saint Luke's Episcopal Presbyterian Hosp.*, 929 F.2d 360 (8th Cir. 1991);

OR

(2) **recognized a ministerial exception that still permits the application of the civil rights laws in certain circumstances,** *see Bollard v. CA Province of the Soc'y of*

Jesus, 929 F.2d 944 (9th Cir. 1999) (allowing sexual harassment claim where defendant was neither exercising its constitutionally protected prerogative to choose its ministers nor embracing the behavior at issue as a protected religious practice). *See also Hankins v. Lyght*, 441 F.3d 96 (2d Cir. 2006); *Curay-Cramer v. Ursuline Acad. of Wilmington, Del., Inc.*, 450 F.3d 130 (3d Cir. 2006); *Shaliehsabou v. Hebrew Home of Greater Wash, Inc.*, 363 F.3d 299 (4th Cir. 2004); *Elvig v. Calvin Presbyterian Church*, 375 F.3d 951 (9th Cir. 2004) (*reh'g en banc denied* 397 F.3d 790 (9th Cir. 2005)); *Merkos L'Inyonei Chinuch, Inc. v. Otsar Sifrei Lubavitch, Inc.*, 312 F.3d 94 (2d Cir. 2002); *Little v. Wuerl*, 929 F.2d 944 (3d Cir. 1991); *Natal v. Christian & Military Alliance*, 878 F.2d 1575 (1st Cir. 1989); *Rayburn v. Gen. Conf. of Seventh Day Adventists*, 772 F.2d 1164 (4th Cir. 1985); *United States v. Woloszczuk*, 458 F.2d 1255 (1st Cir. 1972);

OR

(3) **not yet recognized such an exception**. This last category includes circuits that have only mentioned the ministerial exception in dictum and states that have not yet reached the issue. *See, e.g., Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648 (10th Cir. 2002); *Lewis v. Seventh Day Adventist Lake Region Conf.*, 978 F.2d 940 (6th Cir. 1992); *Hutchison v. Thomas*, 789 F.2d 392 (6th Cir. 1986). The following state supreme courts have not yet embraced a ministerial exception: Alabama, Alaska, Arizona, Delaware, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Missouri, Montana, Nebraska, Nevada, New Hampshire, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Vermont, Virginia, Washington, West Virginia, and Wisconsin.

A. There Is a Split Among Federal Appellate Courts and State Supreme Courts That Have Recognized a "Ministerial Exception" to Title VII Over Whether the First Amendment Bars a Court from Examining the Religious Motivation Behind a Religious Employer's Decision Regarding Clergy Employees

There is a split within the federal circuits and the state supreme courts on the issue whether courts may look behind a religious organization's employment decision when clergy allege invidious discrimination or retaliation in violation of Title VII. A minority of courts has held that it is appropriate for courts to inquire whether the employment decision was related to a religious belief of the organization, which was the holding of the first opinion in this case authored by Judge Becker. "[T]he ministerial exception will not bar Title VII claims by ministerial employees when an employment decision is not motivated by religious belief, religious doctrine, or church regulation." *Petruska v. Gannon Univ.*, 448 F.3d 615, 620 (3d Cir. 2006) (Becker, J.) [hereinafter *Petruska I*], *vacated*, No. 05-1222, 2006 U.S. App. LEXIS 15088, at *1 (3d Cir. June 20, 2006). In contrast, a majority of courts has held that the ministerial exception confers absolute immunity from the federal anti-discrimination laws on religious organizations' dealings with their clergy. *See, e.g.*, *Petruska v. Gannon Univ.*, 462 F.3d 294, 307 (3d Cir. 2006) [hereinafter *Petruska II*].

Judge Becker's approach in *Petruska I* is reflected in other courts, which have held that a Title VII claim can go forward when employment decisions are unrelated to any religious belief of the religious organization, or certain clergy claims implicate only secular considerations. In these cases, courts have reasoned as follows: "The First Amendment

should not require that churches become sanctuaries for sexual harassment by those who act outside of church doctrine . . . our religious institutions [must] honor their secular obligations not to sexually harass those who have been called to become ministers of their faiths." *Elvig v. Calvin Presbyterian Church*, 375 F.3d 951, 969 (9th Cir. 2004) (minister's sexual harassment and retaliation claims go forward because church offered no religious justification for treatment of minister); *see also Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648, 657-58 (10th Cir. 2002) (holding ministerial exception to Title VII does not extend to purely secular decisions, but church could not be held liable for sexual harassment in this case, because remarks were made as part of an ecclesiastical dispute); *Bollard v. Cal. Province of the Soc'y of Jesus*, 196 F.3d 940, 947-48 (9th Cir. 1999) (Jesuit novice's sexual harassment claim could go forward where church provided no doctrinal or free exercise justification for its alleged actions); *McKelvey v. Pierce*, 173 N.J. 26, 54-55 (2002) (sexual harassment is not based in religious doctrine or inherent in church administration and, therefore, Title VII action, if timely filed, could have gone forward and holding that former seminarian's suit for breach of contract and tortious interference with vocation was allowed to proceed); *see also Longo v. Regis Jesuit High Sch. Corp.*, No. 02-cv-001957-PSF-OES, 2006 U.S. Dist. LEXIS 4142, at *18-19 (D. Colo. Jan. 25, 2006) (analogizing from Title VII cases, ministerial exception does not apply to disabled teacher's claim for discriminatory discharge under Americans with Disabilities Act, which can go forward in part because no religious justification was offered for the termination).

Judge Smith's approach in *Petruska II* is reflected in lower court opinions that have held that the First Amendment precludes courts from looking behind a religious

organization's employment decision regarding clergy, despite an otherwise sufficient claim under Title VII. Judge Smith applied this absolute immunity theory to Petitioner's claim, finding that "[t]he ministerial exception, as we conceive of it, operates to bar any claim, the resolution of which would limit a religious institution's right to select who will perform particular spiritual functions." *Petruska II*, 462 F.3d at 307 (gender discrimination); *see also Rweyemamu v. Comm'n on Human Rights & Opportunities*, No. AC 27108, 2006 Conn. App. LEXIS 509, at *13 (Conn. App. Ct. Dec. 12. 2006) (priest's claim of invidious racial discrimination dismissed because courts lack subject matter jurisdiction to hear any civil rights dispute between a religious organization and its clergy); *Gellington v. Christian Methodist Episcopal Church, Inc.*, 203 F.3d 1299, 1304 (11th Cir. 2000) ("[T]he Free Exercise and Establishment Clauses of the First Amendment prohibit a church from being sued under Title VII by its clergy" on claims involving sexual harassment and retaliation); *Rayburn v. Gen. Conf. of Seventh-Day Adventists*, 772 F.2d 1164, 1171 (4th Cir. 1985) (ministerial exception bars Title VII gender and racial discrimination claims where the employment decision "involve[s] the church's spiritual functions."); *Ajabu v. Saint James United Methodist Church*, No. 3:06-cv-00009, 2006 U.S. Dist. LEXIS 55014, at *5 (D. Ga. 2006) ("Ajabu's [Title VII racial] employment discrimination claims fall squarely within the types of claims the ministerial exception protects and from which this Court is prohibited from interfering."); *Bogan v. Miss. Conf. of the United Methodist Church*, 433 F. Supp. 2d 762 (D. Miss. 2006) (pastor's Title VII race discrimination claim dismissed as barred by the ministerial exception); *Rockwell v. Roman Catholic Archdiocese*, No. 02-239-M, 2002 DNH 195, *8 (D.N.H. Oct 30, 2002) (plaintiff's Title VII gender-based discrimination claims dismissed for failure to state a claim because "the so-called

'ministerial exception' . . . generally speaking, provides that state and federal anti-discrimination laws are not applicable to the employment relationship between a church and its ministers or clergy."). *See also Rosati v. Toledo*, 233 F. Supp. 2d 917, 922 (N.D. Ohio 2002) (ministerial exception serves as a bar to claims under the Americans with Disabilities Act where nun was let go for health reasons).

Under the First Amendment, it is settled doctrine that religious belief is absolutely protected. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (the "freedom to believe . . . is absolute . . ."). *See also Employment Div. v. Smith*, 494 U.S. 872, 894 (1990) ("Under our established First Amendment jurisprudence, we have recognized that the freedom to act, unlike the freedom to believe, cannot be absolute."). As this Court eloquently explained in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943), "If there is any fixed start in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion. . . . "

In contrast, it is equally well established that conduct or action can be regulated even when it is religiously motivated. For example, this Court reiterated in *Employment Division v. Smith* the principle that "Our cases do not at their farthest reach support the proposition that a stance of conscientious opposition relieves an objector from any colliding duty fixed by a democratic government." 494 U.S. at 882 (internal quotations omitted) (quoting *Gillette v. United States*, 401 U.S. 437, 461 (1971)). The First Amendment simply has not been an impregnable barrier to regulation of religious entities' actions.

The absolute immunity theory is at odds with the settled doctrine under the First Amendment's Religion Clauses that permits the examination of the sincerity or bona fides of a claim allegedly based on religious belief, though this doctrine is rarely acknowledged in the ministerial exception cases. Even so, it is without question that sincerity analysis is a staple in free exercise doctrine. *See Wisconsin v. Yoder*, 406 U.S. 205, 235 (1972) ("[T]he Amish in this case have convincingly demonstrated the sincerity of their religious beliefs, the interrelationship of belief with their mode of life, the vital role that belief and daily conduct play in the continued survival of Old Order Amish communities and their religious organization . . . ."); *see also Cutter v. Wilkinson*, 544 U.S. 713, 713 (2005) (upholding Religious Land Use and Institutionalized Persons Act ["RLUIPA"] against Establishment Clause challenge as applied to prisoners where "respondents have stipulated that petitioners are members of bona fide religions and that they are sincere in their beliefs"); *Frazee v. Ill. Dep't of Employment Sec.*, 489 U.S. 829, 834 (1989) (holding that a "sincerely held" personal religious belief, as opposed to membership in a particular religious sect, is enough to satisfy a good cause exemption of the Illinois Unemployment Insurance Act); *United States v. Seeger*, 380 U.S. 163, 185 (1965) ("[W]hile the 'truth' of a belief is not open to question, there remains the significant question whether it is 'truly held.' This is the threshold question of sincerity that must be resolved in every case. It is, of course, a question of fact — a prime consideration to the validity of every claim for exemption as a conscientious objector."); *Salahuddin v. Goord*, 467 F.3d 263, 274-75 (2d Cir. 2006) (under RLUIPA, prisoner must show that "disputed conduct substantially burdens his sincerely held religious beliefs"); *Williams v. Bitner*, 455 F.3d 186, 187 (3d Cir. 2006) ("sincerity of [prisoner's] religious beliefs" unchallenged, since prisoner "has acted in

accordance with this interpretation of his religion throughout his incarceration"); *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 674 (10th Cir. 2006) (under RLUIPA, the jury properly found "that Grace United's proposed operation of the daycare center was not a sincere exercise of its religion"); *Kaufman v. McCaughtry*, 419 F.3d 678, 682 (7th Cir. 2005) (for purposes of his Establishment Clause claim, "Kaufman claims that his atheist beliefs play a central role in his life, and the defendants do not dispute that his beliefs are deeply and sincerely held"); *McCarthy v. Ozark Sch. Dist.*, 359 F.3d 1029, 1032 (8th Cir. 2004) (the court assumed for its analysis that plaintiff "[s]choolchildren held sincere religious beliefs against Hepatitis B vaccination"); *Endres v. Ind. State Police*, 349 F.3d 922, 925 (7th Cir. 2003) (although sincerity of plaintiff's beliefs not doubted, plaintiff's religious discrimination claim failed on other grounds); *Patrick v. Le Fevre*, 745 F.2d 153, 157 (2d Cir. 1984) (ordering lower court to apply sincerity analysis of petitioners' beliefs "to determine an adherent's good faith in the expression of his religious belief").

This settled First Amendment doctrine makes it quite clear that courts may look behind demands for religious accommodation to determine whether a claim is in fact religiously motivated. There is no reason under existing First Amendment doctrine to forbid such an inquiry in the civil rights context. Yet, some courts devising a ministerial exception to the federal civil rights laws have done just that.

In the context of Title VII, it is also settled doctrine that courts are to look behind the employer's asserted reasons for an employment action in order to determine whether those reasons are instead a pretext for invidious discrimination. *See, e.g., McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 807 (1973) (finding that the "assigned reason for refusing to

re-employ was a pretext or discriminatory in its application."); *Ash v. Tyson Foods, Inc.*, 126 S. Ct. 1195, 1197 (2006) (per curiam) ("[Q]ualifications evidence may suffice, at least in some circumstances, to show pretext."); *Patterson v. McLean Credit Union*, 491 U.S. 164, 187 (1989) ("The evidence which [a plaintiff] can present in an attempt to establish that . . . stated reasons are pretextual may take a variety of forms."); *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 578 (1978) ("The plaintiff must be given the opportunity to introduce evidence that the proffered justification is merely a pretext for discrimination."). The ministerial exception theory, especially when read as broadly as it was in *Petruska II*, forbids pretext analysis and, therefore, creates status immunity — the religious employer garners immunity from the civil rights laws simply because it is religious, and even when it is not acting on religious motivation.

Despite the entrenched place in free exercise jurisprudence for courts to inquire into the motivation behind a claim for religious accommodation, and the settled doctrine requiring "pretext analysis" in the Title VII context, a host of lower courts has permitted religious employers to engage in invidious discrimination that may be unhitched to religious belief without inquiry into the actual motivation for the employment decision. These courts, with Judge Smith's opinion in this case being one of the most recent to make this error, have gone too far by interpreting the First Amendment as though it mandates absolute immunity from the extraordinarily compelling societal interests embodied in Title VII.[3] Regardless of the merits, however, there is no

[3] There is also an emerging split on whether ministerial exception claims present a jurisdictional bar to judicial consideration of employment discrimination claims by clergy. *Compare Bollard*, 196 F.3d at 950-51 (ministerial exception case properly dismissed for failure to state a claim

question that federal appellate and state supreme courts are split over the appropriateness and the scope of a ministerial exception to the federal anti-discrimination laws.

B. The Lower Courts' Creation of a "Ministerial Exception" to Title VII Has Led Many to Ignore Supreme Court Religion Clause Precedent, Leading to Confusion and a Patchwork of Unpredictable First Amendment Doctrine

The lower courts' "ministerial exception" theories are purportedly derived from the Free Exercise and Establishment Clauses, but typically have been crafted with a very broad brush. As the concept of the "ministerial exception" developed over the decades, without this Court's guidance, the lower courts either ignored crucial Supreme Court precedents or distorted their holdings.

Some courts have disregarded this Court's Free Exercise jurisprudence, especially its 1990 decision in *Smith*, 494 U.S. 872, while others have overlooked this Court's clear statements that religious accommodation can go too far and, thereby, violate the Establishment Clause. *See, e.g.*, *Smith*, 494 U.S. at 913 ("[T]o say that a nondiscriminatory religious-practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required, and that the appropriate occasions for its creation can be discerned by the

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for relief only under Fed. R. Civ. P. 12(b)(6), not due to lack of subject matter jurisdiction under 12(b)(1)), *with Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1042-43 (7th Cir. 2006) (ministerial exception deprives court of subject matter jurisdiction); *Bell v. Presbyterian Church*, 126 F.3d 328, 332-33 (4th Cir. 1997) (same); and *Combs v. Cent. Tex. Annual Conf. of the United Methodist Church*, 173 F.3d 343, 344 (5th Cir. 1999) (dismissed under both 12(b)(1) and 12(b)(6)).

courts."); *see also Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 17 (1989) ("Because Texas' sales tax exemption for periodicals promulgating the teaching of any religious sect lacks a secular objective that would justify this preference along with similar benefits for nonreligious publications or groups, and because it effectively endorses religious belief, the exemption manifestly fails [the *Lemon* test]"), *Hobbie v. Unemployment Appeals Comm'n of Fl.*, 480 U.S. 136, 145 (1987) ("This Court has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause.").

Other courts have read this Court's cases that prohibit the judiciary from deciding religious doctrine or belief, *e.g.*, *Serbian Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976); *Watson v. Jones*, 80 U.S. 679 (1871), as though this Court has established a principle of complete autonomy from the law. This is a gross exaggeration of existing precedent.

1. Free Exercise Doctrine

Under the reasoning of this Court's landmark free exercise decision in *Employment Division v. Smith*, the First Amendment's Free Exercise Clause does not stand as a bar to the application of neutral, generally applicable laws to religious entities. 494 U.S. at 879. There is no doubt that the anti-discrimination provisions of Title VII constitute neutral, generally applicable law, which should be capable of being applied to religious entities. *See Smith*, 494 U.S. at 882 ("Our cases do not at their farthest reach support the proposition that a stance of conscientious opposition relieves an objector from any colliding duty fixed by a democratic

government.") (internal quotations omitted) (quoting *Gillette v. United States*, 401 U.S. 437, 461 (1971)).[4]

This Court explained in *Smith* that legislative accommodation can be permissible, but that it is not mandated by the First Amendment. 494 U.S. at 882-83. Title VII does in fact carefully accommodate religious entities by permitting them to engage in discrimination based on religion "with respect to employment of individuals of a particular religion to perform work connected with the carrying on . . . of its activities." 42 U.S.C. § 2000e-1. This Court has upheld this exemption for employee decisions involving the religious belief of the employee. *See Corporation of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 438 (1987).

A number of courts have ruled that the Religion Clauses require significantly more accommodation than Title VII permits. *See, e.g., McClure v. Salvation Army*, 460 F.2d 553,

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[4] Some courts have distinguished *Smith* on the ground that it only applies to religious individuals, not religious institutions. This reasoning, though, is irrational. A religious organization acting as though it is a "'law unto [it]self'" is every bit as much a threat to democratic, ordered liberty as an individual acting as a "'law unto himself.'" *Smith*, 494 U.S. at 879 (citing *United States v. Reynolds*, 98 U.S. 145, 166-167 (1978)); *see also* Carlos S. Montoya, *Constitutional Development:* Locke v. Davey *and the "Play in the Joints" Between the Religion Clauses*, 6 U. Pa. J. Const. L. 1159, 1174-75 (2004). Indeed, an organization typically has more capacity to undermine compelling government interests like those behind Title VII than an individual would. Moreover, this Court drew no such distinction when it applied the Free Exercise Clause in *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). In that case, this Court extended its free exercise holding in *Smith* to a religious institution.

558 (5th Cir. 1972); *Rayburn v. Gen. Conf. of Seventh-Day Adventists*, 772 F.2d 1164, 1166 (4th Cir. 1985). They rely primarily on this Court's decisions prohibiting courts from dictating a religious organization's religious beliefs or doctrine, including *Serbian Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976); *Kedroff v. Saint Nicholas Cathedral*, 344 U.S. 94 (1952); *Gonzalez v. Roman Catholic Archbishop*, 280 U.S. 1 (1929); and *Watson v. Jones*, 80 U.S. 679 (1871). But they have taken that rule far afield and read this Court's prohibition on judicial *determination* of religious belief as *carte blanche* for religious institutions to avoid the anti-discrimination laws — even if the decision might not be related to religious belief. For example, Judge Richard Posner recently declared that "[e]ven if a suit does not involve an issue of religious doctrine, but concerns merely the governance structure of the church, the courts will not assume jurisdiction if doing so would interfere with the church's management." *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036 (7th Cir. 2006), *cert. denied*, 127 S. Ct. 190 (2006).

Few have taken into account this Court's holding in *Bob Jones University v. United States*, 461 U.S. 574 (1983), that the federal government has a compelling interest in eradicating racial discrimination and, therefore, may go so far as to deny tax exempt status for engaging in such discrimination — even when that discrimination is solidly based on religious belief.

Transforming the Religion Clauses into a fortress for religious entities against neutral and generally applicable anti-discrimination laws has protected acts based on invidious gender discrimination, as well as racial discrimination. *See, e.g.*, *Petruska I*, 462 F.3d at 620, *vacated*, No. 05-1222, 2006 U.S. App. LEXIS 15088, at *1; *Rweyemamu v. Comm'n on*

Human Rights & Opportunities, No. AC 27108, 2006 Conn. App. LEXIS 509 (Conn. App. Ct. Dec. 12, 2006) (applying absolute immunity theory of ministerial exception in invidious racial discrimination case).

This Court desperately needs to address whether Religion Clause precedents mandate absolute immunity from Title VII for religious institutions, as Judge Smith's opinion dictated, *Petruska II*, 462 F.3d at 307, or whether Title VII can be applied to religious entities when the disputed employment decision is not based on religious belief, as Judge Becker's opinion held. *Petruska I*, 448 F.3d at 620, *vacated*, No. 05-1222, 2006 U.S. App. LEXIS 15088, at *1.

2. Establishment Clause Doctrine

While religious accommodation may be permissible, *see, e.g.*, *Corporation of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 338 (1987); *see also Smith*, 494 U.S. at 913, it can also exceed the limits of the Establishment Clause. *See Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 14 (1989) (tax exemption for religious publications held unconstitutional). This is a principle often overlooked in cases crafting a ministerial exception.

For a legislative exemption to be permissible, it must satisfy the standards set forth by this Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971):

> Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or

> primary effect must be one that neither advances nor inhibits religion, finally, the statute must not foster "an excessive government entanglement with religion."

Id. at 612-13.

The same reasoning applies to whether judicial accommodation is permissible, though this Establishment Clause limitation on accommodation has been ignored by lower courts in devising an exception to Title VII for religious employers' decisions regarding clergy. The question is whether this judicial "accommodation" has moved from a permissible accommodation for religiously motivated conduct into a benefit based on religious status alone.

Judge Becker's opinion in this case reasoned that when Title VII was enacted, Congress was careful to accommodate religious employers by eliminating Title VII from interference in employment decisions according to religion. Accordingly, "§§ 702 and 703(e)(1) of Title VII . . . exempt [employee] conduct that does not conform to religious mores." *Petruska I*, 448 F.3d at 620 (internal citations and quotations omitted). Accordingly, when an employee is "discharged on the basis of religion," the statutory exemption under Title VII is triggered and the employer is not liable. *Id.* In contrast, however, when an employee is "fired due to sexism unmoored from religious principle," the statutory exemption should not apply. *Id.*

While Congress created a limited exemption for religious organizations, it remained committed to the obviously compelling interest in eradicating invidious discrimination based on race, gender, and national origin. Congress left Title VII in place for employment decisions even when they

are made by religious organizations when they are not motivated by religious belief. *Cf. Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983) ("[T]he Government has a fundamental, overriding interest in eradicating racial discrimination in education — discrimination that prevailed, with official approval, for the first 165 years of this Nation's constitutional history."). The judicially engineered ministerial exception tips this careful balance of society's simultaneous interests in religious liberty and the end of invidious discrimination into a right of legal immunity for organizations based solely on their religious status, thereby violating the Establishment Clause.

This Court explicitly identified this principle in *Texas Monthly*, which held that "[i]t is part of our settled jurisprudence that 'the Establishment Clause prohibits government from abandoning secular purposes in order to put an imprimatur on one religion, or on religion as such, or to favor the adherents of any sect or religious organization.'" 489 U.S. at 8-9 (quoting *Gillette* v. *United States*, 401 U.S. 437, 450 (1971)). This Court further held that "the Establishment Clause is infringed when the government makes adherence to religion relevant to a person's standing in the political community." *Texas Monthly*, 489 U.S. at 9 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring)). This reasoning casts strong doubt on the constitutionality of the absolute immunity theory of the ministerial exception to Title VII undergirding Judge Smith's opinion below. *Cf. E.E.O.C. v. First Baptist Church*, No. S91-179M, 1992 U.S. Dist. LEXIS 14479, at *32 (N.D. Ind. June 8, 1992) (holding application of a ministerial exception to The Equal Pay Act unconstitutional under *Texas Monthly*). Yet, the courts addressing Title VII and whether there should be a ministerial exception have not taken *Texas Monthly* into account, let alone accounted for how their

expansive reading of religious entities' rights to discriminate could be squared with *Texas Monthly*.

C. There Is a Split Among the Lower Courts Regarding Whether a Religious Organization Can Waive the Ministerial Exception by Representing Itself as an "Equal Opportunity" Employer or Through Acceptance of Federal Funds

There is also a split of authority regarding whether religious employers waive the ministerial exception by representing themselves as "equal opportunity" employers or by accepting federal funds conditioned on being an "equal opportunity" employer, and, once again, the opinions in this case illustrate the lower courts' need for the Supreme Court to clarify this issue. Judge Smith's opinion in *Petruska II* and the D.C. Circuit have found that such a waiver may exist, *Petruska II*, 462 F.3d at 308-09; *Minker v. Balt. Annual Conf. of United Methodist Church*, 894 F.2d 1354, 1357 (D.C. Cir. 1990), whereas Judge Becker's opinion in *Petruska I* rejected the possibility of a waiver theory. *See Petruska I*, 448 F.3d at 620 n.45.

Judge Smith's opinion in *Petruska II*, 462 F.3d 294, found that such a waiver may well exist, but the complaint must allege "an intentional relinquishment of a known right or privilege" which could not be met simply by Gannon University's representation of itself in its employee handbook as an equal opportunity employer or by accepting federal and state funds that entailed obedience to the anti-discrimination laws. *Petruska II*, 462 F.3d at 309 (quoting *Johnson v.*

Zerbst, 304 U.S. 458 (1938)).[5] "By invoking the 'equal opportunity' language, Gannon acknowledged only that it would comply with Title VII to the extent the statute applies to its employment decisions." *Petruska II*, 462 F.3d at 309. The Court found that this was not an intentional relinquishment of the ministerial exception, though left the door open for future cases.[6]

The D.C. Circuit has held, as well, that a religious entity may waive the ministerial exception. In *Minker v. Baltimore Annual Conference of United Methodist Church,* 894 F.2d 1354, the D.C. Circuit considered a waiver claim that "since the Church has already declared its opposition to age discrimination in employment decisions in the *Book of Discipline*, it cannot now claim that it has a religious belief supporting age discrimination," and thus cannot invoke the ministerial exception. *Id.* at 1357. The Court left open the possibility that a religious organization could waive the ministerial exception, but rejected the waiver argument in *Minker*. *Id.*

The New Jersey Supreme Court has stated, in dicta, that a waiver could exist, though did not explain what facts might be necessary for such a finding. *See Welter v. Seton Hall Univ.*, 128 N.J. 279 (1992). In *Welter,* the Court found that the parties had not contemplated, by contract or otherwise, "that Roman Catholic Canon Law would supersede the express procedural safeguards of the [employment] contract."

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[5] This conclusion ignored the well pleaded facts of the complaint that President Rubino specifically represented to Petruska that she would not be removed as University Chaplain because of her gender.

[6] *Petruska I* and *Petruska II* also agreed that Petitioner's employment contract claims could proceed. *Petruska I.*, 448 F.3d at 620; *Petruska II*, 462 F.3d at 310.

Id. at 299. The Court expressed its belief that just as the parties could have provided for religious law to apply, "religious institutions are free to bargain away the right to unimpeded discretion in deciding which persons are most qualified to minister the religion or to train those who will eventually minister the faith. A cursory judicial review of the employment manual or contract to determine whether the ministerially-functioning employee and the religious institution expressly included such a waiver will not transgress the First Amendment." *Id.* at 296. The court did not proceed further on the waiver claim, however, because it found that the teacher involved did not perform ministerial duties.

Other courts have held that a waiver cannot exist. Judge Becker's opinion in *Petruska I* rejected a waiver theory, on the ground that the "ministerial exception . . . is not subject to waiver or estoppel . . . . A federal court will not allow itself to get dragged into a religious controversy even if a religious organization wants it dragged in." 448 F.3d at 620 n.45 (quoting *Tomic*, 442 F.3d at 1042). A Seventh Circuit case involving the Americans with Disabilities Act also rejected a waiver theory. The Seventh Circuit held that the ministerial exception "is not subject to waiver or estoppel." *Tomic*, 442 F.3d at 1042 (applying ministerial exception as a bar to an age discrimination case brought under the ADA). As in this case, the waiver issue presented in *Tomic* was whether a religious organization could avoid federal anti-discrimination law where the organization represented itself as an "equal opportunity employer" in its employee handbook. *Id.* The Court answered the question by concluding that the ministerial exception is simply not subject to estoppel. *Id.*

However, the analysis can be different when an institution accepts federal funding. Congress is free to attach

"reasonable and unambiguous conditions" to federal financial assistance that educational institutions are not required to accept even when the conditions implicate First Amendment activity. *Grove City Coll. v. Bell*, 465 U.S. 555, 575-76 (1984); *see also Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 126 S. Ct. 1297, 1313 (2006) (holding Solomon Amendment requiring educational institutions accepting federal funds to permit military interviewers on campus constitutional). It follows, therefore, that requiring Respondent to comply with the non-discrimination provisions of federal grants and other federal financial assistance does not infringe the First Amendment. Therefore, the acceptance of federal funding that prohibits discrimination could amount to a waiver of any defense to invidious discrimination.

The split over the waiver issue presents a concrete problem that requires this Court's attention, because religious employees like Petitioner need guidance over whether to place their trust in the language of their prospective employer's employee handbooks and specific representations made to them. Moreover, religious employers need to know whether the inclusion of such language and the making of such representation is unenforceable boilerplate or a ground for liability. Similarly, the federal government has an interest in knowing whether the anti-discrimination provisions that condition federal funding are enforceable against religious employers.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests this Court GRANT the petition for certiorari. There is a split among the federal appellate circuits and state supreme courts

over whether the First Amendment mandates immunity from Title VII for clergy employees. Some courts have interpreted the First Amendment to provide absolutely immunity, and, therefore, barred the judiciary from examining whether an employment decision affecting clergy was religiously motivated. Others have read the First Amendment to permit a sincerity or pretext analysis to determine whether the employment decision was religiously motivated and, if not, the religious employer was subject to Title VII's compelling interest in the eradication of invidious discrimination.

This case is a particularly good candidate for this Court to consider the scope and appropriateness of a ministerial exception to the federal anti-discrimination laws reflected in Title VII. There are two well-reasoned appellate opinions below, which apply dramatically different reasoning to reach opposite conclusions. They nicely illustrate the fact that lower courts, religious institutions, and religious employees desperately need this Court's guidance with respect to the judicially created "ministerial exception" to Title VII.

Respectfully submitted,

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462 F.3d 294

Precedential

IN THE UNITED STATES COURT
OF APPEALS
FOR THE THIRD CIRCUIT

Case No: 05-1222

LYNETTE M. PETRUSKA,

Appellant

v.

GANNON UNIVERSITY; THE BOARD OF TRUSTEES OF GANNON UNIVERSITY; WILLIAM I. ALFORD, II; ROBERT H. ALLSHOUSE; JOSEPH F. ALLISON; MICHAEL P. ALLISON, REV.; JAMES A. BALDAUF; L. SCOTT BARNARD; GEORGE J. BEHRINGER; ARNOLD E. BERGQUIST; LAWRENCE E. BRANDT, REV. MSGR.; ROBERT L. BRUGGER, REV. MSGR.; DONALD M. CARLSON; DANIEL C. CARNEVAL, D.O.; STEPHANIE DIMITROVICH, HON.; THOMAS L. DOOLIN; JAMES J. DURATZ; ANTOINE M. GARIBALDI; THOMAS C. GUELCHER; WILLIAM M. HILBERT, SR.; BRIAN J. JACKMAN; JAMES W. KEIM, JR.; MARY RITA KUHN, SR., SSJ; THOMAS J. LOFTUS; ANNE C. MCCALLION; JOSEPH T. MESSINA; MICHAEL J. NUTTALL; JOHN E. PAGANIE; DENISE ILLIG ROBISON; JAMES J. RUTKOWSKI, JR; JAMES A. SCHAFFNER; HELEN M. SCHILLING, M.D., D.D.S.; JOHN M. SCHULTZ, VERY REV.; ROBERT J. SMITH, REV. MSGR.; LAWRENCE T. SPEICE, REV. MSGR.; WILLIAM C. SPRINGER; JAMES G. TOOHEY; DONALD W. TRAUTMAN, BISHOP; ANASTASIA VALIMONT, SR. SSJ; RICARDA VINCENT, SR. SSJ;

MELVIN WITHERSPOON; ALL OTHER KNOWN AND UNKNOWN MEMBERS OF THE BOARD OF TRUSTEES OF GANNON UNIVERSITY DURING THE TENURE OF DONALD W. TRAUTMAN, as members of the Board of Trustees of Gannon University; DAVID RUBINO, MSGR., in their individual and official capacities; NICHOLAS ROUCH, REV., in their individual and official capacities

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On Appeal from the United States District Court
For the Western District of Pennsylvania
(D.C. Civ. Action No. 04-80)
District Judge: The Honorable Sean J. McLaughlin

Argued August 16, 2006*

BEFORE: SMITH, COWEN, and GREENBERG

(Filed: September 6, 2006)

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* This case was originally argued on October 20, 2005, before Judges Smith, Becker, and Nygaard. On May 23, 2006, an opinion by a majority of the original panel was filed, affirming in part, reversing in part, and remanding the case for further proceedings. Judge Smith filed a dissenting opinion on the same day. Judge Becker, who authored the majority opinion, died on May 19, 2006, after the case had been circulated to the full court, but before the opinions were filed. Appellants petitioned for rehearing en banc or, in the alternative, rehearing by a reconstituted panel. Because of this chain of events, the Court granted the Appellants' request for rehearing by a reconstituted panel. Judge Nygaard subsequently recused himself from the reconstituted panel. Judges Cowen and Greenberg were selected at random to replace Judges Becker and Nygaard.

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OPINION OF THE COURT

SMITH, *Circuit Judge*:

Former University Chaplain Lynette Petruska appeals an order from the United States District Court for the Western District of Pennsylvania dismissing her federal employment discrimination and state law claims against Gannon University ("Gannon" or "the University"), the private Catholic diocesan college that employed her

from July 16, 1997 until October 15, 2002. The District Court dismissed Petruska's complaint for lack of jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1), holding that the "ministerial exception" – a doctrine rooted in the First Amendment – barred her claims.

This Court has not previously ruled on the viability or the scope of the ministerial exception. Today, we join seven of our sister circuits in adopting the exception and hold that it applies to any claim, the resolution of which would limit a religious institution's right to choose who will perform particular spiritual functions.

Petruska's Title VII discrimination and retaliation claims, as well as her state civil conspiracy and negligent retention and supervision claims, are barred by the ministerial exception insofar as they implicate a church's right to select its ministers under the Free Exercise Clause. Because resolution of Petruska's fraudulent misrepresentation and breach of contract claims do not limit Gannon's free exercise rights, and because an evaluation of these claims would not violate the Establishment Clause, they are not precluded by the exception. Nevertheless, Petruska has failed to plead fraud with particularity as required by Federal Rule of Civil Procedure 9(b). Accordingly, we will affirm the District Court's order dismissing Petruska's Title VII discrimination and retaliation claims, as well as her state civil conspiracy, negligent retention and supervision, and fraudulent misrepresentation claims. For the reasons set forth below, we will remand her breach of contract claim for further consideration by the District Court.

I. Factual and Procedural Background

For purposes of a motion to dismiss, we must accept as true – as did the District Court – the plaintiff's factual allegations. *See Mortensen v. First Fed. Sav. & Loan,* 549 F.2d 884, 891 (3d Cir. 1977) (explaining the standard of review for Rule 12(b)(1) and Rule 12(b)(6) motions).[1] Accordingly, the facts set forth below are drawn from Petruska's First Amended Complaint.

Gannon University is a private Catholic diocesan college located in Erie, Pennsylvania. Gannon hired Petruska as the University's Director of Social Concerns on July 16, 1997. At that time, Reverend Nicholas Rouch was the University Chaplain. When Rouch left to study in Rome for a period of three years, he was promised that he could resume his position as chaplain when he returned. In his absence, the University appointed an interim chaplain, who held the position until June of 1999. When the interim chaplain resigned, then-President Monsignor David Rubino promoted Petruska to permanent University Chaplain on July 1, 1999, with the advice and consent of Bishop Trautman, the Chair of Gannon's Board of Trustees (the "Board"). Petruska was the first female in Gannon's history to serve in that position. As such, and cognizant of the promise made to Rouch, Petruska specifically sought assurances from Rubino that she would not simply be replaced when Rouch returned or another qualified male

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[1] As discussed *infra,* Gannon's motion to dismiss was framed in the alternative. Although we conclude that it is most properly construed as a Rule 12(b)(6) motion, we note that the standard is the same when considering a facial attack under Rule 12(b)(1) or a motion to dismiss for failure to state a claim under Rule 12(b)(6). *Mortensen,* 549 F.2d at 891.

became available. Rubino assured her that future decisions regarding her tenure as chaplain would be based solely on her performance, not her gender.

Several months after her appointment, in March of 2000, Rubino was forced to take a leave of absence when allegations surfaced that he was having a sexual affair with a female subordinate. Thereafter, another female employee accused Rubino of sexual harassment, and Petruska was instrumental in bringing this claim to the attention of Bishop Trautman and then-Provost Dr. Thomas Ostrowski. Rubino formally resigned in May of 2000, and Ostrowski was appointed Acting President. Following Rubino's resignation, and at Bishop Trautman's behest, Gannon began a campaign to cover-up Rubino's misconduct. Petruska strenuously – and vocally – objected to the University's response.[2]

In July of 2000, Ostrowski met with Bishop Trautman, as well as Rouch, who had by then returned from

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[2] Petruska's activism with respect to gender and harassment-related issues was not limited to her role in the Rubino affair. In 1998, while she was still the Director of Social Concerns, Petruska served on the University's Sexual Harassment Committee. At the time of her appointment to that Committee, the University was in the process of revising its sexual harassment policy, and several of Gannon's lawyers had advocated limiting the time period in which grievances could be filed. Petruska opposed this proposal, and her view ultimately prevailed.

Moreover, after she became chaplain and subsequent to Rubino's resignation, Petruska was appointed as Chair of Gannon's Institutional Integrity Committee. In this position, she was integrally involved in preparing a report for Gannon's Middle States accreditation, which criticized the University's policies and procedures related to discrimination and harassment. Despite a request from Gannon's President, the Committee refused to modify portions of its report which were critical of the University.

Rome. Bishop Trautman notified Ostrowski that he had created a new position – Vice-President for Mission and Ministry – and that he had appointed Rouch to fill it. The position was created without input from any other University officials and did not include a job description. At that meeting, the Bishop informed Ostrowski that he was to remove Petruska as University Chaplain. When Ostrowski refused, Bishop Trautman instructed him to restructure the Chaplain's Division by placing it under the leadership of Rouch. Ostrowski also refused to take part in the proposed restructuring.

On July 28, 2000, Ostrowski told Petruska about his meeting with Rouch and Bishop Trautman. He explained the proposed restructuring and asked Petruska how she would respond if the Chaplain's Office were placed under Rouch's leadership. Petruska indicated that she would challenge this decision, and Ostrowski conceded that the proposed action was being taken on the basis of her gender. Although Ostrowski stated that he would try to prevent the restructuring and Petruska's removal, he later explained that he could delay, but not prevent, these events.

On October 2, 2000, Petruska signed a revised contract, which was equivalent to those of the other vice-presidents at Gannon. Her contract was thereby extended until June 30, 2003. From March to May of 2001, Ostrowski repeatedly suggested that Petruska consider accepting another position at Gannon, because Bishop Trautman and Reverend Rouch would never let her remain as University Chaplain. Ostrowski was removed from consideration in the presidential search on April 19, 2001.

On May 21, 2001, Dr. Antoine Garibaldi was appointed President of Gannon and he began his tenure on July 1, 2001. After Garibaldi became President, some of Petruska's responsibilities were reassigned and she was instructed to limit her comments at University events.

On August 21, 2002, Garibaldi notified Petruska that he had decided to restructure and informed her that she would be removed from the President's Staff and that the Chaplain's Division would report to Rouch. Garibaldi did not present the restructuring proposal to the University's President's Council as required by Gannon's Governance Manual. Petruska informed Garibaldi that she knew that this action was being taken against her because of her gender and told him that she would be open to a "buy out" of her contract. Although Garibaldi indicated that he would be willing to discuss the restructuring, he later declined to discuss the matter with Petruska. After meeting with Garibaldi, Petruska orally requested information about filing a discrimination grievance with the University Review Council, but was notified in a letter dated August 28, 2002 that the University Review Council was not a proper forum because her complaint was directed against the President and Chair of the Board.

On September 30, 2002, Rouch called Petruska and indicated that he wanted to discuss the restructuring. She declined to meet with him until she resolved her concerns about the University's discriminatory conduct with Garibaldi. That same day, Petruska sent an e-mail to Garibaldi, stating that she intended to speak publicly about the questionable motives underlying the restructuring, but noted that she was willing to meet with him to discuss how all parties could "move forward" if Ricarda Vincent, the president of her community, was permitted to attend.

Garibaldi did not respond. Petruska later learned that, during a telephone conversation between Bishop Trautman and Vincent, the Bishop "yelled" at Vincent. The next day, October 1, Vincent told Petruska that she could not take any action against Gannon, nor was she to make any comment about Gannon's discriminatory conduct. Faculty, staff, and students were informed of Petruska's "demotion" from the head of the Chaplain's Division.

On October 7, 2002, Rouch once again contacted Petruska regarding the restructuring. In response, she sent an e-mail to Garibaldi, noting that she had not yet received an answer to her request for a meeting. The next day, Garibaldi responded to Petruska's e-mail, indicating that the University would take "appropriate action" if she did not report to Rouch. Believing that she was about to be fired, she tendered her resignation with two-weeks notice on October 14, 2002. The following day, Rouch and Bob Cline, Gannon's Human Resources Director, entered Petruska's office and told her that her resignation was accepted effective immediately.

Based on these events, Petruska filed a complaint with the Equal Employment Opportunity Commission ("EEOC") on August 20, 2003. Upon exhausting her administrative remedies, she received a ninety-day "right-to-sue" letter. She filed this action in the United States District Court for the Western District of Pennsylvania against Gannon University, members of the Board of Trustees (including Trautman, Garibaldi, and Vincent), Rubino, and Rouch. Petruska asserted six claims: (1) gender discrimination in violation of Title VII against all Defendants; (2) retaliatory discrimination in violation of Title VII against all Defendants; (3) fraudulent misrepresentation against Gannon, Rubino, and Trautman; (4) civil

conspiracy against Trautman, Garibaldi, and Rouch; (5) breach of contract against Gannon and Garibaldi; and (6) negligent supervision and retention against Gannon and its Board. Gannon moved to dismiss Petruska's claims pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of jurisdiction, or in the alternative, pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim on which relief can be granted. The District Court granted the motion, concluding that the ministerial exception barred adjudication of Petruska's claims.

II. Gannon's Motion to Dismiss

The District Court granted the motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of jurisdiction. Although we agree that the ministerial exception applies in this case, we conclude that the exception does not act as a jurisdictional bar, but rather, is best viewed as a challenge to the sufficiency of Petruska's claim under Rule 12(b)(6). *See, e.g., Elvig v. Calvin Presbyterian Church,* 375 F.3d 951, 955 (9th Cir. 2004); *Bryce v. Episcopal Church in the Diocese of Colorado,* 289 F.3d 648, 654 (10th Cir. 2002).

At issue in a Rule 12(b)(1) motion is the court's "very power to hear the case."[3] *Mortensen,* 549 F.2d at 891. A

[3] As the District Court correctly noted, there are two types of Rule 12(b)(1) motions: those that attack the complaint on its face and those that attack subject matter jurisdiction as a matter of fact. When considering a facial attack, "the Court must consider the allegations of the complaint as true," and in that respect such a Rule 12(b)(1) motion is similar to a Rule 12(b)(6) motion. *Mortensen,* 549 F.2d at 891. However, as the court explained in *Mortensen*:

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Rule 12(b)(6) motion, by contrast, tests the legal sufficiency of plaintiff's claim. In other words, for purposes of resolving a Rule 12(b)(6) motion, the question is whether the plaintiff would be able to prevail even if she were able to prove all of her allegations. *Id.*

In this case, the question does not concern the court's power to hear the case – it is beyond cavil that a federal district court has the authority to review claims arising under federal law – but rather whether the First Amendment bars Petruska's claims. *See Elvig,* 375 F.3d at 955 ("Federal question jurisdiction is statutorily established, giving district courts 'original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.'"). In that respect, as the Tenth Circuit noted in *Bryce,* assertion of the ministerial exception – or, in that case, the "church autonomy doctrine" – is akin to a government official's defense of qualified immunity, which is often raised in a Rule 12(b)(6) motion. *Bryce,* 289 F.3d at 654. The exception may serve as a barrier to the success of a plaintiff's claims, but it does not affect the court's

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> The factual attack . . . differs greatly for here the trial court may proceed as it never could under 12(b)(6) or Fed. R. Civ. P. 56. Because at issue in a factual 12(b)(1) motion is the trial court's jurisdiction . . . there is substantial authority that the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case. In short, no presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims. Moreover, the plaintiff will have the burden of proof that jurisdiction does in fact exist.

Id. In this case, the District Court treated the motion as a facial attack, but construed Petruska's references to matters outside the pleadings as an informal request to amend her complaint.

authority to consider them. We therefore review Petruska's complaint to determine whether she has stated a claim upon which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6). So construing the motion to dismiss, we have jurisdiction under 28 U.S.C. § 1291. *Jordan v. Fox Rothschild O'Brien & Frankel, Inc.*, 20 F.3d 1250, 1251 (3d Cir. 1994). Our review is plenary. *Id.*

III. The Ministerial Exception to Title VII

Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment on the basis of race, sex, national origin, or religion and forbids retaliation based on an employee's opposition to practices made unlawful under the statute. 42 U.S.C. § 2000e-2; 42 U.S.C. § 2000e-3. The statute exempts religious entities and educational organizations from its non-discrimination mandate to the extent that an employment decision is based on an individual's religious preferences. *See* 42 U.S.C. § 2000e-1(a) (providing an exception for "religious corporation, association, educational institution, or society with respect to employment of individuals of a particular religion to perform work connected with the carrying on . . . of its activities"); *see also* 42 U.S.C. § 2000e-2(e) (permitting religious educational institutions "to hire and employ employees of a particular religion"). By its terms, however, Title VII "does not confer upon religious organizations the right to make those same decisions on the basis of race, sex, or national origin." *Rayburn v. Gen'l Conf. of Seventh Day Adventists*, 772 F.2d 1164, 1166 (4th Cir. 1985).

The questions presented in this case are whether applying Title VII to Gannon's decision to restructure

would infringe upon its free exercise rights and whether adjudication of Petruska's Title VII claims would result in unconstitutional entanglement under the Establishment Clause. Every one of our sister circuits to consider the issue has concluded that application of Title VII to a minister-church relationship would violate – or would risk violating[4] – the First Amendment and, accordingly, has

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[4] Whereas some courts have derived the ministerial exception from the doctrine of constitutional avoidance, *see, e.g., McClure v. Salvation Army*, 460 F.2d 553, 560-61 (5th Cir.1972), others have determined that, under its plain language, Title VII applies to ministerial employment decisions, but they have nevertheless concluded that such an application is unconstitutional, *see, e.g., Rayburn*, 772 F.3d 1164, 1165-67 (4th Cir.1985). As a general rule, if there is a permissible construction of the statute which will not result in a "significant risk" of constitutional infringement, we are to adopt that construction without reaching the constitutional question. *Geary v. Visitation of the Blessed Virgin Mary Parish Sch.*, 7 F.3d 324, 327 (3d Cir.1993). We conclude, as did the Fourth Circuit, that such an approach is not possible in this case.

Both the plain text of Title VII and its legislative history foreclose the possibility of imposing a limiting construction upon the statute. *See Rayburn*, 772 F.3d [sic] at 1165-67. As the *Rayburn* Court explained:

> While the language of § 702 [42 U.S.C. § 2000e-1] makes clear that religious institutions may base relevant hiring decisions upon religious preferences, Title VII does not confer upon religious organizations a license to make those same decisions on the basis of race, sex or national origin. The statutory exemption applies to one particular reason for employment decision – that based upon religious preference. It was open to Congress to exempt from Title VII the religious employer, not simply one basis of employment, and Congress plainly did not.

Id. at 1166-67. Title VII's legislative history "reinforces the plain meaning of the statutory text." *Id.* at 1167. Although Congress has several times revisited the scope of the exemption for religious employers, it has never extended to such institutions the authority to discriminate on the basis of sex. *See id.* at 1167. Accordingly, we agree with the Fourth Circuit that Congress intended Title VII to apply to

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recognized some version of the ministerial exception.[5] To the extent that a claim involves the church's selection of

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cases involving sexual discrimination and retaliation by religious institutions. We must therefore reach the constitutional question – i.e., whether application of Title VII to a ministerial employment relationship violates the First Amendment.

[5] *See, e.g., EEOC v. Roman Catholic Diocese of Raleigh,* 213 F.3d 795 (4th Cir. 2000); *Rayburn v. Gen'l Conf. of Seventh Day Adventists,* 772 F.2d 1164 (4th Cir. 1985); *Combs v. Central Texas Annual Conf. of the United Methodist Church,* 173 F.3d 343 (5th Cir. 1999); *McClure v. Salvation Army,* 460 F.2d 553 (5th Cir. 1972); *Alicea-Hernandez v. Catholic Bishop of Chicago,* 320 F.3d 698 (7th Cir. 2003); *Young v. Northern Illinois Conf. of United Methodist Church,* 21 F.3d 184 (7th Cir. 1994); *Scharon v. St. Luke's Episcopal Presbyterian Hosp.,* 929 F.2d 360 (8th Cir. 1991); *Elvig v. Calvin Presbyterian Church,* 375 F.3d 951 (9th Cir. 2004); *Bollard v. Soc'y of Jesus,* 196 F.3d 940 (9th Cir. 1999); *Gellington v. Christian Methodist Episcopal Church,* 203 F.3d 1299 (11th Cir. 2000); *EEOC v. Catholic Univ. of Amer.,* 83 F.3d 455 (D.C. Cir. 1996); *see also Starkman v. Evans,* 198 F.3d 173 (5th Cir. 1999) (applying ministerial exception to Americans with Disabilities Act claim); *Werft v. Desert Southwest Annual Conf. of the United Methodist Church,* 377 F.3d 1099 (9th Cir. 2004) (same).

The First Circuit also addressed the application of the First Amendment to a minister's claims in *Natal v. Christian Missionary Alliance,* 878 F.2d 1575 (1st Cir. 1989). Although the case involved state law claims rather than any federal employment discrimination law, the Court made clear that inquiry into allegations related to a minister's employment would be barred by the First Amendment. Specifically, it explained:

> Because of the difficulties inherent in separating the message from the messenger – a religious organization's fate is inextricably bound up with those whom it entrusts with the responsibilities of preaching its word and ministering to its adherents – Natal's case necessarily falls within the scope of the Court's monition. By its nature, the inquiry which Natal would have us undertake into the circumstances of his discharge plunges an inquisitor into a maelstrom of Church policy, administration, and governance. It is an inquiry barred by the Free Exercise Clause.

Id. at 1578.

clergy – in other words, its choice as to who will perform particular spiritual functions[6] – most of these circuits have held that the exception bars any inquiry into a religious organization's underlying motivation for the contested employment decision.[7]

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[6] In evaluating whether a particular employee is subject to the ministerial exception, other circuits have concluded that the focus should be on the "function of the position." *Rayburn*, 772 F.2d at 1168. As a general rule, an employee will be considered a minister if her primary duties include "teaching, spreading the faith, church governance, supervision of a religious order, or supervision of participation in religious ritual and worship." *Id. at* 1169; *see, e.g., Alicea-Hernandez*, 320 F.3d at 703 (applying ministerial exception to Hispanic Communications Director who functioned as a "press secretary" for the church); *Starkman*, 198 F.3d at 175-76 (holding that Choir Director at Methodist church was minister for purposes of First Amendment analysis); *Catholic Univ.*, 83 F.3d at 455 (applying exception to professor of canon law at Catholic University). Although we do not view this list as exclusive, we agree that a focus on the function of an employee's position is the proper one.

[7] *See Rayburn*, 772 F.2d at 1169 ("[T]he free exercise clause of the First Amendment protects the act of a decision rather than a motivation behind it. In these sensitive areas, the state may no more require a minimum basis in doctrinal reasoning than it may supervise doctrinal content."); *Combs*, 173 F.3d at 350 ("We cannot conceive how the federal judiciary could determine whether an employment decision concerning a minister was based on legitimate grounds without inserting ourselves into a realm where the Constitution forbids us to tread."); *Young*, 21 F.3d at 186 (quoting *Rayburn*, 772 F.2d at 1169); *Scharon*, 929 F.2d at 363 ("Personnel decisions by church-affiliated institutions affecting clergy are *per se* religious matters and cannot be reviewed by civil courts for to review such decisions would require the courts to determine the meaning of religious doctrine and canonical law and to impose a secular court's view of whether in the context of the particular case religious doctrine and canonical law support the decision the church authorities have made. This is precisely the kind of judicial second-guessing of decision-making by religious organizations that the Free Exercise Clause forbids.") (citations omitted); *Bollard*, 196 F.3d at 947 (indicating that a "Jesuit order's choice of representative" is ordinarily "a decision to which we would simply defer without further inquiry");

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Although we have not previously confronted a factually appropriate case in which to determine whether the ministerial exception is constitutionally warranted, we have acknowledged and cited with approval its application by other courts of appeals. *See Little v. Wuerl,* 929 F.2d 944, 947 (3d Cir. 1991) (citing *McClure v. Salvation Army,* 460 F.2d 553 (5th Cir. 1972); *Rayburn,* 772 F.2d 1164) ("Relying on this basic principle, courts have consistently found that Title VII does not apply to the relationship between ministers and the religious organizations that employ them, even where the discrimination is alleged on the basis of race or sex."); *Geary v. Visitation of the Blessed Virgin Mary,* 7 F.3d 324, 329 (3d Cir. 1993) (citing *Scharon,* 929 F.2d at 363) ("Indeed, when the employee who challenges an employment decision is a member of the clergy, some courts have refused to allow even this limited inquiry."). Because we conclude that a federal court's resolution of a minister's Title VII discrimination or retaliation claim would infringe upon First Amendment protections, we now join those courts in adopting the exception.[8]

Minker, 894 F.2d at 1357 (finding that court need not determine whether reasons for employment decision were "independently ecclesiastical in nature" to apply ministerial exception).

The Eleventh Circuit has recognized the ministerial exception, *see Gellington,* 203 F.3d 1299, but has not directly addressed whether the exception applies without regard to motive. We note, however, that the *Gellington* Court seemed to tacitly approve of a conclusion by the Fifth Circuit that "the constitutional protection of religious freedom afforded to churches in employment actions involving clergy exists even when such actions are not based on issues of church doctrine or ecclesiastical law." *Gellington,* 203 F.3d at 1303 (citing *Combs,* 173 F.3d at 350).

[8] Although our sister circuits seem to agree that the ministerial exception is grounded in the First Amendment, their rationales for

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adopting the exception – as opposed to undertaking some other remedial action – is often less clear. As concerns remedy, the Supreme Court's recent decision in *Ayotte v. Planned Parenthood of Northern New England,* 126 S. Ct. 961 (2006), indicates that a narrow exception to prevent the unconstitutional enforcement of Title VII is the proper remedy.

In *Ayotte,* the Supreme Court considered the appropriate judicial response where the enforcement of a statute would render an unconstitutional result. It held that "invalidating [a] statute entirely is not always necessary or justified" where courts are "able to render narrower declaratory and injunctive relief." *Id.* at 964. The Court explained:

> Generally speaking, when confronting a constitutional flaw in a statute, we try to limit the solution to the problem. We prefer, for example to enjoin only the unconstitutional applications of a statute while leaving the other applications in force, see *United States v. Raines,* 362 U.S. 17, 20-22 (1960), or to sever its problematic portions while leaving the remainder in tact, *United States v. Booker,* 543 U.S. 220, 227-29 (2005).

Id. at 967.

The *Ayotte* Court set forth several guiding principles to "inform our approach to remedies." *Id.* It explained that the courts should not engage in "quintessentially legislative work," and accordingly, cautioned that we should not endeavor to draw lines where doing so would be "inherently complex." *Id.* at 968. The Court also instructed us to consider the intent of the legislature: In other words, we must ask whether the legislature would "have preferred what is left of its statute or no statute at all[.]" *Id.* Finally, in selecting a remedy, we must "try not to nullify more of a legislature's work than is necessary. . . . " *Id.* at 967.

In this case, we conclude that application of the ministerial exception is not "inherently complex": It requires federal courts to determine only whether the resolution of the plaintiff's claim would limit a church's right to choose who will perform particular spiritual functions. Further, we agree with the implied findings of our sister circuits that Congress would prefer a tailored exception to Title VII than a complete invalidation of the statute. Finally, our remedy is limited: It does not apply to *all* employment decisions by religious institutions, nor does it apply to *all* claims by ministers. It applies only to claims involving a religious institution's choice as to who will

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A. The Free Exercise Clause of the First Amendment

The First Amendment of the United States Constitution provides that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." U.S. Const. amend. I. The Religion Clauses extend to both legislative and judicial action, *see Kreshik v. Saint Nicholas Cathedral of the Russian Orthodox Church of North Amer.,* 363 U.S. 190, 191 (1960), and apply equally to state and federal laws, *see Elk Grove Unified Sch. Dist. v. Newdow,* 542 U.S. 1, 8 (2004) (citing *Cantwell v. Connecticut,* 310 U.S. 296, 303 (1940)).

The Free Exercise Clause protects not only the individual's "right to believe and profess whatever religious doctrine one desires," *Employment Division, Dep't of Human Resources of Oregon v. Smith,* 494 U.S. 872, 877 (1990), but also a religious institution's right to decide matters of faith, doctrine, and church governance. *Kedroff v. St. Nicholas Cathedral,* 344 U.S. 94, 116 (1952); *see also Serbian Orthodox Diocese v. Milivojevich,* 426 U.S. 696, 713 (1976) ("[C]ivil courts are bound to accept the decisions of the highest judicatories of a religious organization of hierarchical policy on matters of discipline, faith, *internal organization,* or ecclesiastical rule, custom, or law.") (emphasis added). In ministerial exception cases, those rights are interrelated.

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perform spiritual functions. We also note that this is the "finely drawn" remedy requested by Gannon. *See id.* at 969 (noting that the parties recognized the possibility of a "modest remedy"). Accordingly, we conclude that the ministerial exception is the proper response to the constitutional defect in Title VII.

First, like an individual, a church in its collective capacity must be free to express religious beliefs, profess matters of faith, and communicate its religious message. Unlike an individual who can speak on her own behalf, however, the church as an institution must retain the corollary right to select its voice. A minister is not merely an employee of the church; she is the embodiment of its message. A minister serves as the church's public representative, its ambassador, and its voice to the faithful. Accordingly, the process of selecting a minister is *per se* a religious exercise. As the Fifth Circuit explained: "The relationship between an organized church and its ministers is its lifeblood. The minister is the chief instrument by which the church seeks to fulfill its purpose." *McClure,* 460 F.2d at 558-59. "Matters touching this relationship must necessarily be recognized as of prime ecclesiastical concern." *Id.* at 559.[9] Consequently, any restriction on the church's right to choose who will carry its spiritual message necessarily infringes upon its free exercise right to profess its beliefs. This right is squarely at issue in Petruska's First Amended Complaint.

The second right protected by the Free Exercise Clause – the church's right to decide matters of governance and internal organization – is also implicated by Gannon's decision to restructure. The Vice President for Mission and Ministry and the University Chaplain at Gannon both serve spiritual functions – in other words,

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[9] In addition to their role within the religious organization, ministers also have a direct relationship with a church's members: Ministers marry their children and bury their parents; they act as their spiritual counselors and serve as their moral advisors. To these members, the selection of a minister is undoubtedly a question of religious concern.

the primary duties of those employees include "teaching, spreading the faith, church governance, supervision of a religious order, or supervision of participation in religious ritual and worship."[10] *See Rayburn,* 772 F.2d at 1169. Accordingly, Gannon's decisions regarding who to install in those positions and the manner in which their duties would be divided were decisions about who would perform those constitutionally protected spiritual functions. Those choices are protected from governmental interference by the Free Exercise Clause.

The ministerial exception, as we conceive of it, operates to bar any claim, the resolution of which would limit a religious institution's right to select who will perform particular spiritual functions. Accordingly, in this case, the relevant question with respect to each of Petruska's claims is whether application of the state or federal law will limit Gannon's right to choose who performs particular spiritual

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[10] Petruska argues that she was not a "chaplain" as that term is understood in the Roman Catholic Church, nor did she have any written job requirements which specifically defined her position at the University. Nevertheless, Petruska's own complaint establishes that her primary duties involved ministerial functions. Among other things, Petruska alleges that she served as co-chair for the Catholic Identity Task Force, held prayer services, and was traditionally involved in planning liturgies. Moreover, as the District Court correctly noted, her own "performance objectives" included "develop[ing] strategies to increase participation in sacramental life of [the] Gannon community." It is clear from the face of Petruska's complaint that the functions she performed as University Chaplain were ministerial in nature.

With respect to the Vice President of Mission and Ministry position, Petruska alleges that Rouch was installed in that role and served in a supervisory capacity over the Chaplain's Division. To the extent that the Vice President of Mission and Ministry supervises spiritual functionaries, at least some of the functions he performs are, by definition, spiritual ones.

functions on its behalf. Petruska asserts six claims in her First Amended Complaint: two violations of Title VII – discrimination and retaliation (Counts I and II, respectively); fraudulent misrepresentation (Count III); civil conspiracy (Count IV); breach of contract (Count V); and negligent supervision and retention (Count VI). We conclude that resolution of Counts I, II, IV, and VI would impose unconstitutional limits on Gannon's First Amendment right to the free exercise of religion. Consequently, we hold that they are barred by the ministerial exception.

1. Petruska's Title VII Claims

Petruska alleges that Gannon demoted and constructively discharged her from her position as University Chaplain based on her gender and retaliated against her on the basis of her opposition to sexual harassment at the University. Her discrimination and retaliation claims are premised upon Gannon's decision to restructure, a decision which Petruska argues was merely pretext for gender discrimination. It is clear from the face of Petruska's complaint, however, that Gannon's choice to restructure constituted a decision about who would perform spiritual functions and about how those functions would be divided. Accordingly, application of Title VII's discrimination and retaliation provisions to Gannon's decision to restructure would violate the Free Exercise Clause.[11] For that reason,

[11] We acknowledge that it may not always be clear whether a minister's Title VII claim involves a church's decision regarding who will perform spiritual functions. For example, in *Elvig v. Calvin Presbyterian Church*, 375 F.3d 951, 955 (9th Cir. 2004), the Ninth Circuit considered a Presbyterian minister's claims that she was sexually harassed and subject to retaliation by her supervising pastor. The *Elvig* Court recognized that a church's decisions in selecting its

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Petruska's Title VII claims (Counts I and II) should be dismissed.

Petruska argues that Gannon waived its right to raise the ministerial exception as a defense by (1) failing to raise it before the EEOC; (2) accepting state and federal funds with conditions limiting discrimination; and (3) repeatedly and publicly representing itself as an equal opportunity employer. We find these arguments unpersuasive.

First, as the District Court correctly noted, although a plaintiff has an obligation to exhaust her administrative remedies as a prerequisite to suit, we are aware of no authority that requires a defendant to proffer every possible defense or legal argument before the EEOC, much less to raise all constitutional challenges. *Cf., e.g., McGinty v. New York,* 251 F.3d 84, 93-94 (2d Cir. 2001) (concluding that failure to raise Eleventh Amendment immunity as a defense did not result in waiver in subsequent federal court action under the ADEA); *Marie v. Allied Home Mortgage Corp.,* 402 F.3d 1, 15 (1st Cir. 2005) (holding that appellee did not waive right to raise arbitration defense in

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clergy are protected by the First Amendment and held that to the extent that a plaintiff's claims implicated ministerial employment decisions, the claims were foreclosed. Nevertheless, over a vigorous dissent, the Court concluded that, in that case, the sexual harassment, hostile work environment, and retaliation claims (verbal abuse and intimidation) did not implicate protected employment decisions. It therefore reversed the district court's order dismissing those claims.

In Petruska's case, the retaliatory conduct at issue is the employment decision itself, which *Elvig* recognizes as a decision protected by the Free Exercise Clause. Because Petruska does not raise a sexual harassment or hostile work environment claim, and because the retaliatory conduct she alleges constitutes a protected choice, we need not decide today whether the types of claims at issue in *Elvig* would fall within the ministerial exception to Title VII.

district court by failing to raise it before EEOC); *Brennan v. King,* 139 F.3d 258, 263 (1st Cir. 1998) (same). Moreover, as a general rule, an administrative agency is not competent to determine constitutional issues. *See, e.g, Weinberger v. Salfi,* 422 U.S. 749, 765 (1975) ("Exhaustion is generally required as a matter of preventing premature interference with agency process, so that the agency may function efficiently and so that it may have the opportunity to correct its own errors, to afford the parties and the courts the benefit of its experience and expertise, and to compile a record which is adequate for judicial review. . . . Plainly these purposes have been served once the Secretary has satisfied himself that the only issue is the constitutionality, a matter which is beyond his jurisdiction to determine. . . ."); *but cf. Bethlehem Steel Corp. v. Occupational Safety and Health Review Commission,* 607 F.2d 871, 876 (3d Cir. 1976) (concluding that in context of OSHA enforcement cases, "there are compelling reasons for insisting that fourth amendment claims for suppression of evidence . . . be tendered first to the Commission.").

In this case, we can see no reason that the general rule regarding agencies' lack of competence to resolve constitutional claims should not apply. The EEOC has no special expertise to resolve First Amendment claims, nor is Gannon's assertion of the ministerial exception related to the EEOC's jurisdiction or administrative procedures. We therefore cannot conclude that Gannon's failure to raise the ministerial exception before the EEOC resulted in a waiver of its right to raise it in federal court.[12]

[12] Petruska cites no persuasive authority to support her contention that Gannon is precluded from raising the ministerial exception for the first time in federal district court. The only case to which she points in

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Second, Gannon did not "waive" its First Amendment rights by representing itself as an "equal opportunity employer" or by accepting federal and state funds. A waiver is "an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst,* 304 U.S. 458, 464 (1938). "'[C]ourts indulge every reasonable presumption against waiver' of fundamental constitutional rights." *Id.* (citation omitted). Here neither Gannon's invocation of "equal employer" language nor its acceptance of funds constitutes a waiver of its First Amendment rights. By invoking the "equal opportunity" language, Gannon acknowledged only that it would comply with Title VII to the extent the statute applies to its employment decisions. It does not apply in this context. We thus agree that Gannon did not waive its right to raise the ministerial exception and we conclude that the District Court properly applied the exception to Petruska's Title VII claims.

2. Petruska's State Tort Law Claims

Petruska's First Amended Complaint also contains three state tort claims: civil conspiracy (Count IV), negligent supervision and retention (Count VI), and fraudulent

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support of this argument is the Ninth Circuit's decision in *Marshall v. Able Contractors, Inc.*, 573 F.2d 1055, 1057 (9th Cir. 1978). That case is inapposite. At issue in *Marshall* was a district court's order compelling the plaintiff to submit to OSHA inspections. The Ninth Circuit held that an agency should make a determination as to its own jurisdiction before a federal court considers it. In this respect, *Marshall* stands only for the proposition that an agency is entitled to consider its *own* jurisdiction and procedural requirements in the first instance.

misrepresentation (Count III). The civil conspiracy[13] and negligent supervision[14] claims turn on Petruska's ability to prove that Gannon's restructuring constituted an unlawful or tortious act. Because the First Amendment protects Gannon's right to restructure – regardless of its reason for doing so – we cannot consider whether the act was unlawful or tortious and, therefore, these claims must be dismissed.

By contrast, Petruska's fraudulent misrepresentation claim requires no such conclusion. To establish a claim for fraudulent misrepresentation, a plaintiff must prove: "(1) a misrepresentation, (2) a fraudulent utterance thereof, (3) an intention by the maker that the recipient will thereby be induced to act, (4) justifiable reliance by the recipient upon the misrepresentation and (5) damage to the recipient as the proximate result." *Martin v. Lancaster Battery Co.*, 530 Pa. 11, 19, 606 A.2d 444, 448 (Pa. 1992). Unlike Petruska's civil conspiracy or negligent supervision claims,

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[13] Civil conspiracy requires proof that two or more persons combined to do an unlawful act or to do an otherwise lawful act by unlawful means. *See, e.g., Thompson Coal Co. v. Pike Coal*, 488 Pa. 198, 211 (Pa. 1979). In this case, the alleged underlying unlawful act is the violation of Title VII.

[14] Under Pennsylvania law, a employer may be liable for negligent supervision "where the employer fails to exercise ordinary care to prevent an intentional harm to a third party which (1) is committed on the employer's premises by an employee acting outside the scope of his employment and (2) is reasonably foreseeable." *Mullen v. Topper's Salon & Health Spa, Inc.*, 99 F. Supp. 2d 553, 556 (E.D. Pa. 2000) (citations omitted). Although Petruska's First Amended Complaint is replete with references to the current priest sexual abuse scandals and allegations that Bishop Trautman covered up harassment and abuse directed towards other individuals, the only intentional harm to which she claims she was personally subjected is the underlying discrimination and retaliation.

which require proof of the unlawful act or intentional harm, the resolution of Petruska's fraudulent misrepresentation claim does not turn on the lawfulness of the decision to restructure, but rather upon the truth or falsity of the assurances that she would be evaluated on her merits when she was initially appointed as University Chaplain in July of 1999.

Because the state's prohibition against fraud does not infringe upon Gannon's freedom to select its ministers, resolution of Petruska's fraudulent misrepresentation claim would not violate the Free Exercise Clause. Nevertheless, we conclude that Petruska has failed to plead fraud with particularity as required by Federal Rule of Civil Procedure 9(b), and accordingly, affirm the District Court's dismissal of that claim.[15] *See Christidis v. First Pennsylvania Mortg. Trust,* 717 F.2d 96, 99 (3d Cir. 1983) (indicating that the pleading requirements of Rule 9(b) "appl[y] not only to fraud actions under federal statutes, but to fraud claims based on state law.").

3. Petruska's State Law Contract Claim

In Count V of her First Amended Complaint, Petruska alleges that pursuant to her contract with Gannon, she was entitled to serve on the President's Staff and lead the

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[15] In affirming the dismissal of Petruska's fraudulent misrepresentation claim on this basis, we anticipate that the District Court will afford her the opportunity to file an amended complaint. *Borelli v. City of Reading,* 532 F.2d 950 (3d Cir. 1976). Should she file an amended complaint which complies with the particularity requirement of Rule 9(b), the District Court is instructed to evaluate her claim consistent with the analysis set forth in section III.B. of this Opinion.

Chaplain's Division. She claims that by changing her responsibilities, Gannon breached its contract.

On its face, application of state contract law does not involve government-imposed limits on Gannon's right to select its ministers: Unlike the duties under Title VII and state tort law, contractual obligations are entirely voluntary. As the court noted in *Minker v. Baltimore Annual Conference of United Methodist Church,* 894 F.2d 1354, 1360 (D.C. Cir. 1990), "[a] church is always free to burden its activities voluntarily through contract, and such contracts are fully enforceable in civil court." *See also, e.g., Rayburn*, 772 F.2d at 1171 ("Like any other organization, [churches] may be held liable . . . upon their valid contracts."). Enforcement of a promise, willingly made and supported by consideration, in no way constitutes a state-imposed limit upon a church's free exercise rights. Accordingly, application of state law to Petruska's contract claim would not violate the Free Exercise Clause.

B. The Establishment Clause

Above and beyond its Free Exercise argument, Gannon contends that resolution of Petruska's claims would violate the Establishment Clause. Because we conclude that Petruska failed to plead fraud with specificity and that her Title VII, civil conspiracy, and negligent retention and supervision claims are barred by the Free Exercise Clause, we need not address those claims further. Petruska's claim for breach of contract, however, remains subject to review under the Establishment Clause. Based upon our analysis in *Geary v. Visitation of the Blessed Virgin Mary Parish School,* 7 F.3d 324 (3d Cir. 1993), we cannot conclude that review of this claim would, at the

outset, unconstitutionally entangle the court in religion, and we therefore remand it to the District Court.

In *Lemon v. Kurtzman,* 403 U.S. 602, 612-13 (1971), the Supreme Court set forth a three-prong test to determine the validity of a statute under the Establishment Clause: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; . . . and finally, the statute must not foster 'an excessive government entanglement with religion.'" Only the entanglement prong is at issue in evaluating Petruska's contract claim.

Entanglement may be substantive – where the government is placed in the position of deciding between competing religious views – or procedural – where the state and church are pitted against one another in a protracted legal battle. *See, e.g., Catholic Univ.,* 83 F.3d at 465. Therefore, courts typically consider the character of the claim, the nature of the remedy, and the presence or absence of a "direct conflict between the . . . secular prohibition and the proffered religious doctrine." *Geary,* 7 F.3d at 328.

In *Geary,* the question presented was whether judicial review of a Catholic school teacher's Age Discrimination in Employment Act (ADEA) claims would excessively entangle the courts where the school's stated reason for the adverse employment decision was based on the plaintiff's marriage to a divorced man in violation of church doctrine. *Id.* We concluded that resolution of Geary's ADEA claims would not offend the Establishment Clause because the inquiry was limited to whether the school discriminated against Geary on the basis of her age and canceled her insurance in retaliation for her suit. *Id.* Geary did not challenge the validity of the religious doctrine; she merely

claimed that the religious doctrine did not motivate the suit. *Id.* at 329. We therefore held that "when the pretext inquiry neither traverses questions of the validity of religious beliefs nor forces a court to choose between parties' competing religious visions, that inquiry does not present a significant risk of entanglement." *Id.* at 330.

The Court of Appeals for the District of Columbia Circuit took a similar approach to a minister's breach of contract claim in *Minker,* 894 F.2d at 1360. *Minker* involved a Methodist minister's claim that he was orally promised a more suitable pastorship, but was denied such a position based on his age. *Id.* at 1355. The *Minker* court affirmed the dismissal of the minister's ADEA and state law discrimination claim as well as a contract claim based on the Methodist Church's Book of Discipline, but reversed the dismissal with respect to the oral contract claim. *Id.* at 1359. The court acknowledged that inquiry into the church's reasons for failing to meet its contractual obligation could constitute excessive entanglement under the Establishment Clause, but nevertheless concluded that Minker's claim could "be adduced by a fairly direct inquiry" into whether there was an offer, acceptance, consideration, and breach. *Id.* at 1360. The court further noted that if resolution of the contract claim required inquiry into the church's ecclesiastical policy, the district court could grant summary judgment on entanglement grounds.

Although the ministerial exception does not apply to lay employees, we are presented with no principled reason to distinguish between clergymen and laity for purposes of determining whether resolution of a contract dispute will unduly entangle us under the Establishment Clause. Therefore, the question is whether Petruska's breach of contract claim can be decided without wading into doctrinal

waters. Much like the claims in *Geary* and the oral contract claim in *Minker,* Petruska's breach of contract claim "do[es] not inevitably or even necessarily lead to government inquiry into [Gannon's] religious mission or doctrines." *Geary,* 7 F.3d at 329. Resolution of this claim does not turn on an ecclesiastical inquiry – or, at least not at the outset. If Gannon's response to Petruska's allegations raise issues which would result in excessive entanglement, the claims may be dismissed on that basis on summary judgment. Such a conclusion, however, is not inevitably drawn from the face of Petruska's complaint. We will therefore remand this claim for further consideration by the District Court.

IV. Conclusion

The First Amendment protects a church's right to decide matters of faith and to declare its doctrine free from state interference. A church's ability to select who will perform particular spiritual functions is a necessary corollary to this right. The function of Petruska's position as University Chaplain was ministerial in nature, and therefore, her Title VII, civil conspiracy, and negligent retention and supervision claims – each of which directly turns on the propriety of Gannon's personnel decisions – must be dismissed. Likewise, Petruska's fraud claim was not plead with sufficient particularity to withstand a motion to dismiss. Accordingly, we will affirm the District Court's order with respect to these claims. For the reasons set forth above, however, we will be remand Petruska's contract claim for further consideration by the District Court.

IN THE UNITED STATES COURT
OF APPEALS
FOR THE THIRD CIRCUIT

Case No: 05-1222

LYNETTE M. PETRUSKA,

Appellant

v.

GANNON UNIVERSITY; THE BOARD OF TRUSTEES OF GANNON UNIVERSITY; WILLIAM I. ALFORD, II; ROBERT H. ALLSHOUSE; JOSEPH F. ALLISON; MICHAEL P. ALLISON, REV.; JAMES A. BALDAUF; L. SCOTT BARNARD; GEORGE J. BEHRINGER; ARNOLD E. BERGQUIST; LAWRENCE E. BRANDT, REV. MSGR.; ROBERT L. BRUGGER, REV. MSGR.; DONALD M. CARLSON; DANIEL C. CARNEVAL, D.O.; STEPHANIE DOMITROVICH, HON.; THOMAS L. DOOLIN; JAMES J. DURATZ; ANTOINE M. GARIBALDI; THOMAS C. GUELCHER; WILLIAM M. HILBERT, SR.; BRIAN J. JACKMAN; JAMES W. KEIM, JR.; MARY RITA KUHN, SR., SSJ; THOMAS J. LOFTUS; ANNE C. MCCALLION; JOSEPH T. MESSINA; MICHAEL J. NUTTALL; JOHN E. PAGANIE; DENISE ILLIG ROBISON; JAMES J. RUTKOWSKI, JR.; JAMES A. SCHAFFNER; HELEN M. SCHILLING, M.D., D.D.S.; JOHN M. SCHULTZ, VERY REV.; ROBERT J. SMITH, REV. MSGR.; LAWRENCE T. SPEICE, REV. MSGR.; WILLIAM C. SPRINGER; JAMES G. TOOHEY; DONALD W. TRAUTMAN, BISHOP; ANASTASIA VALIMONT, SR. SSJ; RICARDA VINCENT, SR. SSJ; MELVIN WITHERSPOON; ALL OTHER KNOWN AND UNKNOWN MEMBERS OF THE BOARD OF TRUSTEES OF GANNON UNIVERSITY DURING

THE TENURE OF DONALD W. TRAUTMAN, as members of the Board of Trustees of Gannon University; DAVID RUBINO, MSGR., in their individual and official capacities; NICHOLAS ROUCH, REV., in their individual and official capacities

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On Appeal from the United States District Court
For the Western District of Pennsylvania
(D.C. Civ. Action No. 04-80)
District Judge: The Honorable Sean J. McLaughlin

Argued August 16, 2006

BEFORE: SMITH, COWEN, and GREENBERG

JUDGMENT

This cause came to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued on August 16, 2006. On consideration thereof, it is now ORDERED and ADJUDGED that the judgment of the District Court entered on December 17, 2004, be and the same hereby is AFFIRMED IN PART and REVERSED IN PART. The matter is REMANDED for further proceedings consistent with the opinion of this Court. The parties shall bear their own costs.

ATTEST:

Marcia M. Waldron
Clerk

Dated: September 6, 2006

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 05-1222

LYNETTE M. PETRUSKA,
Appellant

v.

GANNON UNIVERSITY; THE BOARD OF TRUSTEES OF GANNON UNIVERSITY; WILLIAM I. ALFORD, II; ROBERT H. ALLSHOUSE; JOSEPH F. ALLISON; MICHAEL P. ALLISON, REV.; JAMES A. BALDAUF; L. SCOTT BARNARD; GEORGE J. BEHRINGER; ARNOLD E. BERGQUIST; LAWRENCE E. BRANDT, REV. MSGR.; ROBERT L. BRUGGER, REV. MSGR.; DONALD M. CARLSON; DANIEL C. CARNEVAL, D.O.; STEPHANIE DOMITROVICH, HON.; THOMAS L. DOOLIN; JAMES J. DURATZ; ANTOINE M. GARIBALDI; THOMAS C. GUELCHER; WILLIAM M. HILBERT, SR.; BRIAN J. JACKMAN; JAMES W. KEIM, JR.; MARY RITA KUHN, SR., SSJ; THOMAS J. LOFTUS; ANNE C. MCCALLION; JOSEPH T. MESSINA; MICHAEL J. NUTTALL; JOHN E. PAGANIE; DENISE ILLIG ROBISON; JAMES J. RUTKOWSKI, JR.; JAMES A. SCHAFFNER; HELEN M. SCHILLING, M.D., D.D.S.; JOHN M. SCHULTZ, VERY REV.; ROBERT J. SMITH, REV. MSGR.; LAWRENCE T. SPEICE, REV. MSGR.; WILLIAM C. SPRINGER; JAMES G. TOOHEY; DONALD W. TRAUTMAN, BISHOP; ANASTASIA VALIMONT, SR. SSJ; RICARDA VINCENT, SR. SSJ; MELVIN WITHERSPOON; ALL OTHER KNOWN AND

UNKNOWN MEMBERS OF THE BOARD OF TRUSTEES OF GANNON UNIVERSITY DURING THE TENURE OF DONALD W. TRAUTMAN, as members of the Board of Trustees of Gannon University; DAVID RUBINO, MSGR., in their individual and official capacities; NICHOLAS ROUCH, REV., in their individual and official capacities

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On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Civ. Action No. 04-80)
District Judge: Honorable Sean J. McLaughlin

Argued October 20, 2005
Before: SMITH, BECKER, and NYGAARD,
Circuit Judges[1]

(Filed: May 24, 2006)

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[1] The Honorable Edward R. Becker authored this opinion, but died before it was released.

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OPINION OF THE COURT

BECKER, *Circuit Judge.*

The ministerial exception to Title VII, a doctrine adopted by numerous courts, exempts religious organizations from employment discrimination suits brought by ministers. Grounded in the Establishment and Free Exercise Clauses of the United States Constitution, the ministerial exception was created to protect church autonomy and avoid entangling government in religious affairs. This case requires us to determine the reach of the ministerial exception in this Circuit.

We adopt a carefully tailored version of the ministerial exception. Where otherwise illegal discrimination is based on religious belief, religious doctrine, or the internal regulations of a church, the First Amendment exempts religious institutions from Title VII. In such cases, restricting a church's freedom to select its ministers would violate the Free Exercise Clause by inhibiting the church's ability to express its beliefs and put them into practice.

Furthermore, questions about religious matters would pervade litigation, entangling courts in ecclesiastical matters and violating the Establishment Clause.

But where a church discriminates for reasons unrelated to religion, we hold that the Constitution does not foreclose Title VII suits. Employment discrimination unconnected to religious belief, religious doctrine, or the internal regulations of a church is simply the exercise of intolerance, not the free exercise of religion that the Constitution protects. Furthermore, in adjudicating suits that do not involve religious rationales for employment action, courts need not consider questions of religious belief, religious doctrine, or internal church regulation, a process that would violate the Establishment Clause by entangling courts in religious affairs.

Lynette Petruska brings suit against Gannon University, a Catholic institution, and various Gannon University officials (collectively, "Gannon"). She alleges in replete detail that Gannon, acting without any religious or ecclesiastical motivation, demoted her because she is a woman and because she opposed sexual harassment by Gannon officials.

The District Court granted Gannon's motion to dismiss Petruska's Title VII claims under Federal Rule of Civil Procedure 12(b)(1), reasoning that the ministerial exception barred these claims. As we explain below, a motion such as Gannon's is more properly dealt with under Rule 12(b)(6), which requires us to treat Petruska's allegations as true.[2] Accordingly, we assume that Gannon

[2] At all events, the District Court did not engage in factfinding, and what we deal with here is functionally a Rule 12(b)(6) dismissal.

lacked a religious rationale for Petruska's demotion. We will therefore reverse the dismissal of her Title VII claims.

Petruska also asserts state law causes of action for breach of contract, fraudulent misrepresentation, negligent supervision and retention, and civil conspiracy. The District Court dismissed these claims under Rule 12(b)(1), reasoning that the religion clauses removed jurisdiction. Reviewing the dismissal under Rule 12(b)(6), we cannot conclude at this stage of litigation that these claims will require an examination of matters of faith, doctrine, or internal church regulation. Therefore, they are not barred by the religion clauses.[3]

I.

The facts set forth below are drawn from Petruska's First Amended Complaint, which we must accept as true for purposes of a Rule 12(b)(6) motion. Gannon University is a Catholic diocesan college located in Erie, Pennsylvania. Gannon hired Petruska as the university's Director of Social Concerns in July of 1997. Petruska was appointed permanent chaplain on July 1, 1999. She was to be the first female chaplain in Gannon's history.

Prior to accepting the position, Petruska sought assurances from Gannon's President, David Rubino, that she would not be replaced when Reverend Nicholas Rouch, a former Gannon chaplain who had left to study in Rome, returned, or when another male became available. She

[3] We will reverse the dismissal of Petruska's state law claims, with the exception of the fraudulent misrepresentation claim. This claim was not pled with sufficient particularity under Federal Rule of Civil Procedure 9(b).

submits that she requested these assurances due to: (1) a policy or practice of gender discrimination at Gannon; (2) her knowledge that the position of chaplain had been promised to Rouch upon his return; and (3) the reputation of Bishop Donald Trautman, chair of Gannon's Board of Directors, for being unable to work with women and for removing women from leadership positions. Rubino assured Petruska that decisions regarding her tenure as chaplain would be based solely on her performance, and not her gender.

Petruska's role as chaplain was essentially that of a vice president. She served in a cabinet-level position on the President's staff and was co-chair of Gannon's Catholic Identity Task Force. Petruska's religious duties included holding prayer services and planning liturgies.

Several months after Petruska's appointment, in March of 2000, Rubino was forced to take a leave of absence when he was accused of having a sexual affair with a female subordinate. Rubino admitted the affair to various university officials. Thereafter, a different female employee accused Rubino of sexual harassment. Petruska was instrumental in bringing this claim to the attention of Trautman and Provost Thomas Ostrowski. Rubino resigned in May of 2000 and Ostrowski was appointed acting President. At Trautman's behest, Gannon then began a campaign to conceal Rubino's misconduct.

Petruska served on Gannon's Sexual Harassment Committee as the university was in the process of revising its sexual harassment policy. Although several of Gannon's lawyers advocated limiting the time period in which grievances could be filed, Petruska opposed this proposal, and her view ultimately prevailed. Petruska was also

involved in preparing a report that criticized Gannon's discrimination and harassment policies. Despite a request from Gannon's President, the committee that prepared the report refused to modify portions criticizing the university.[4]

In July of 2000, Ostrowski, then serving as acting President, met with Trautman, as well as Rouch, who had returned from Rome. Trautman told Ostrowski to place the Chaplain's Division under the control of Rouch, thereby making Petruska Rouch's subordinate. Ostrowski refused.

Ostrowski told Petruska about Trautman's plan and asked Petruska how she would respond if the Chaplain's Division were placed under Rouch's leadership. According to Petruska, Ostrowski conceded that the proposed action was being taken *solely* on the basis of Petruska's gender. Later, Ostrowski "made it clear to [Petruska] that Trautman and Rouch would never let her remain Chaplain at Gannon because of her gender."

In a January 2001 meeting, Ostrowski was informed that once a new President was appointed, Trautman intended to "clean house" by removing three high-ranking university officials, all of whom were female: Petruska, the Executive Director of Admissions, and the acting Provost. In May of 2001, Antoine Garibaldi was appointed President of Gannon. As President, Garibaldi required Rouch's approval of all important decisions that Petruska, as chaplain, ordinarily made.

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[4] Petruska also alleges that she challenged the propriety of allowing a former Gannon priest, who was removed due to sexual misconduct toward students, from returning to campus.

In August of 2002, Garibaldi notified Petruska that he had decided to restructure the university, that she would be removed from the President's Staff, and that the Chaplain's Division would report to Rouch. The effect of the restructuring was to make Rouch Petruska's boss.

After a series of events convinced Petruska that she was on the verge of being fired, she tendered her resignation in October of 2002. After Petruska's resignation, Rouch repeatedly told Gannon students and staff that a woman would not be considered to replace Petruska as chaplain.

Petruska filed this action in the District Court for the Western District of Pennsylvania against Gannon University, Gannon's Board of Trustees, and various Gannon officials. Petruska asserted six claims, naming some or all of the defendants in the following counts: (1) Title VII sex discrimination; (2) Title VII retaliation; (3) fraudulent misrepresentation; (4) civil conspiracy; (5) breach of contract; and (6) negligent supervision and retention. The District Court granted Cannon's motion to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(1), concluding that the religion clauses barred adjudication of Petruska's claims.

II.

Federal courts have long struggled to balance state regulation and religious freedom. *See, e.g., Serbian Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976). In the employment context, the source of this conflict is readily apparent. The government possesses a vital interest in promoting equality in the workplace, but this interest at times collides with the constitutional right of a religious

institution to be free from excessive state interference.[5] In balancing these competing interests, several courts have applied the ministerial exception, which exempts religious institutions from Title VII suits brought by employees charged with ministerial duties.

In *McClure v. Salvation Army*, 460 F.2d 553, 555 (5th Cir. 1972), the seminal case on the ministerial exception, a female officer of the Salvation Army alleged that she received a lower salary and fewer benefits than male employees, and that she was discharged for complaining of these disparities. The Fifth Circuit held that the First Amendment barred the former officer's claim, stating:

> The relationship between an organized church and its ministers is its lifeblood. The minister is the chief instrument by which the church seeks to fulfill its purpose. Matters touching this relationship must necessarily be recognized as of prime ecclesiastical concern.

Id. at 558-59.

Seven federal circuits now recognize the ministerial exception.[6] Six have held that the exception applies

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[5] *Compare Rayburn v. Gen. Conf. of Seventh-Day Adventists*, 772 F.2d 1164, 1171 (4th Cir. 1985) ("Of course churches are not – and should not be – above the law."), *with Bollard v. California Province of the Soc'y of Jesus*, 196 F.3d 940 (9th Cir. 1999) ("[T]he Free Exercise Clause protects the power of religious organizations 'to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.'") (quoting *Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church of N. Am.*, 344 U.S. 94, 116 (1952)).

[6] *See EEOC v. Roman Catholic Diocese of Raleigh*, 213 F.3d 795 (4th Cir. 2000); *Rayburn*, 772 F.2d 1164; *McClure*, 460 F.2d 553; *Alicea-Hernandez v. Catholic Bishop of Chicago*, 320 F.3d 698 (7th Cir. 2003);

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regardless of whether the motive for the discrimination is religious in nature.[7] In evaluating whether a particular employee's suit is subject to the ministerial exception, the essential question is whether the employee's "primary functions" serve the "spiritual and pastoral mission" of a church. *E.E.O.C. v. Catholic Univ. of Am.*, 83 F.3d 455, 463 (D.C. Cir. 1986).[8]

Courts have derived the ministerial exception both through direct constitutional analysis and by applying the doctrine that ambiguous statutes must be interpreted to avoid significant constitutional risks. The Fourth Circuit determined that Title VII applies by its clear language to

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Young v. Northern Illinois Conf. of United Methodist Church, 21 F.3d 184 (7th Cir. 1994); *Scharon v. St. Luke's Episcopal Presbyterian Hospitals*, 929 F.2d 360 (8th Cir. 1991); *Werft v. Desert Southwest Annual Conf. of the United Methodist Church*, 377 F.3d 1099 (9th Cir. 2004); *Gellington v. Christian Methodist Episcopal Church, Inc.*, 203 F.3d 1299 (11th Cir. 2000); *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455 (D.C. Cir. 1996).

[7] *See E.E.O.C. v. Roman Catholic Diocese of Raleigh*, 213 F.3d 795, 801 (4th Cir. 2000) ("The exception precludes any inquiry whatsoever into the reasons behind a church's ministerial employment decision. The church need not, for example, proffer any religious justification for its decision . . . "); *Combs v. Central Texas Annual Conference of United Methodist Church*, 173 F.3d 343, 350 (5th Cir. 1999); *Young*, 21 F.3d at 186; *Alicea-Hernandez*, 320 F.3d at 703; *Scharon*, 929 F.2d at 363; *Werft*, 377 F.3d at 1103; *Catholic Univ of Am.*, 83 F.3d at 464-65.

Although the Eleventh Circuit has recognized the ministerial exception, *see Gellington*, 203 F.3d 1299, it does not appear to have directly addressed whether the exception applies without regard to motive.

[8] *See also Alicea-Hernandez*, 320 F.3d at 703 (applying the ministerial exception to a Hispanic Communications Manager who functioned as a "press secretary" for the church); *Starkman v. Evans*, 198 F.3d 173, 175-76 (5th Cir. 1999) (holding that a choir director at a Methodist church was a minister for purposes of First Amendment analysis).

ministerial employment decisions. *See Rayburn v. Gen. Conf. of Seventh-Day Adventists*, 772 F.2d 1164, 1165-67 (4th Cir. 1985). The Court therefore reached the direct constitutional question and held that the religion clauses bar employment suits by ministers. *See id.* at 1165-72; *see also Scharon*, 929 F.2d at 361-63. *McClure*, however, applied the constitutional avoidance doctrine and reasoned that Title VII does not apply unambiguously to the hiring and firing of ministers. *See* 460 F.2d at 560-61.

Courts have also derived the ministerial exception from different constitutional provisions. Some have concluded that the Free Exercise Clause commands the exception, whereas others have opined that the exception is rooted in both the Free Exercise Clause and the Establishment Clause.[9]

Our survey of Court of Appeals decisions has revealed three explanations of why the Constitution may require the ministerial exception. We delineate these rationales now and later consider whether they apply to this case. First, some courts have articulated a "government scrutiny" rationale, which holds that the ministerial exception is necessary to avoid government probing or examination of a church's affairs.[10] The "government scrutiny" rationale

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[9] *See McClure*, 460 F.2d at 560 (Free Exercise Clause); *Alicea-Hernandez*, 320 F.3d at 702-03 (Free Exercise Clause); *Young*, 21 F.3d at 186 (Free Exercise Clause), *Werft*, 377 F.3d at 1101 (both religion clauses); *Rayburn*, 772 F.2d at 1167-72 (both religion clauses); *Scharon*, 929 F.2d at 361-63 (both religion clauses).

[10] *See, e.g., Rayburn*, 772 F.2d at 1171 ("Church personnel and records would inevitably become subject to subpoena, discovery, cross-examination, the full panoply of legal process designed to probe the mind of the church in the selection of its ministers."); *Scharon*, 929 F.2d at 363 ("It is not only the conclusions that may be reached . . . which

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is based on the Establishment Clause, which commands the government to avoid entanglement in religious matters.[11]

Second, some courts have advanced a "selection of clergy" rationale. Under this theory, religious institutions should be free to select their own ministers, and the government should have no role in this process. Whereas the "government scrutiny" rationale focuses on the process of judicial inquiry, the "selection of clergy" rationale aims to prevent the government from controlling actual employment *decisions.*[12] While our sister circuits have grounded the "selection of clergy" argument in both the Free Exercise Clause and the Establishment Clause,[13] it appears to flow more naturally from the Free Exercise Clause, because it focuses on the right of a church to put its beliefs into practice through its choice of ministers.

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may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry.") (quoting *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 502 (1979)).

[11] *See Rayburn*, 772 F.2d at 1171 ("[P]ervasive monitoring by public authorities . . . infringes precisely those Establishment Clause values at the root of the prohibition of excessive entanglement.") (quoting *Aguilar v. Felton*, 473 U.S. 402, 413 (1985)) (alterations in original); *see generally Lemon v. Kurtzman*, 403 U.S. 602 (1971).

[12] *See, e.g., Weft*, 377 F.3d at 1101 ("[B]ecause clergy represent a religious institution to the people, a religious institution must retain unfettered freedom in its choice of clergy.").

[13] *Rayburn*, for example, derives the "selection of clergy" argument from both clauses. *See* 772 F.2d at 1168 ("Any attempt by government to restrict a church's free choice of its leaders . . . constitutes a burden on the church's *free exercise* rights.") (emphasis added); *id* at 1171 ("Bureaucratic suggestion in employment decisions of a pastoral character, in contravention of a church's own perception of its needs and purposes, would constitute unprecedented *entanglement* with religious authority . . . ") (emphasis added).

Finally, some courts have based the ministerial exception on an "inquiry into religious doctrine" rationale. Under this justification, the ministerial exception is necessary to prevent courts from resolving religious questions, which lie beyond judicial competence and authority. The Eighth Circuit has opined that "to review [ministerial employment] decisions would require the courts to determine the meaning of religious doctrine and canonical law." *Scharon*, 929 F.2d at 363.[14] The "inquiry into religious doctrine" rationale is more narrow than the "government scrutiny" rationale. The "government scrutiny" rationale is concerned with any intrusion into the internal affairs of a church, regardless of whether the government intrudes in a manner that requires it to resolve religious questions. The "inquiry into religious doctrine" rationale has been framed both in Free Exercise and Establishment Clause terms.[15]

This Court has not had occasion in prior cases to adopt or reject the ministerial exception. In two cases, however, we have considered employment claims brought against religious organizations by non-ministerial employees. In *Little v. Wuerl*, 929 F.2d 944, 946 (3d Cir. 1991), a Catholic school refused to rehire a teacher because she

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[14] *See also Combs*, 173 F.3d at 350 ("[S]ecular authorities would be involved in evaluating or interpreting religious doctrine."); *Simpson*, 494 F.2d at 493 ("[C]ivil courts are barred by the First Amendment from determining ecclesiastical questions.").

[15] *See Scharon*, 929 F.2d at 363 (stating that to decide questions of religious doctrine and law would violate the Free Exercise Clause); *Gellington*, 203 F.3d at 1304 (stating that an employment suit would involve the government "in questions of religious doctrine, polity, and practice" in violation of the Establishment Clause (quoting *Jones v. Wolf*, 443 U.S. 595, 603 (1979)).

remarried without following the proper canonical process to validate her second marriage. We concluded that §§ 702 and 703(e)(1) of Title VII, 42 U.S.C. §§ 2000e-1 and 2000e-2(e)(1), exempt "conduct [that] does not conform to [religious] mores." *Id.* at 945. Therefore, we held that the school could decline to rehire the plaintiff on the basis of her remarriage. *Id.* at 951.

The ministerial exception did not apply in *Little* both because the plaintiff was not a ministerial employee and because she was discharged on the basis of religion, thus triggering statutory exemptions under Title VII. Nonetheless, we did mention the ministerial exception in dicta: "[C]ourts have consistently found that Title VII does not apply to the relationship between ministers and the religious organizations that employ them, even where discrimination is alleged on the basis of race or sex." *Id.* at 947 (citing *McClure* and *Rayburn).*

In *Geary v. Visitation of the Blessed Virgin Mary Parish School*, 7 F.3d 324 (3d Cir. 1993), a teacher brought suit against a parochial school under the ADEA. Like *Little*, *Geary* involved a non-ministerial employee. However, whereas the plaintiff in *Little* brought a claim for religious discrimination, the plaintiff in *Geary* sued for age discrimination. *Id.* at 328. Specifically, the plaintiff contended that she was fired due to her age, while the school asserted that she was fired for marrying a divorced man. *Id.* at 326. We concluded that the plaintiff's suit did not "present a significant risk" of infringing the First Amendment. *Id.* at 331.

With these precedents in mind, we turn to Petruska's claims, and the procedural posture in which they come to us.

III.

The District Court dismissed Petruska's claims under Federal Rule of Civil Procedure 12(b)(1). While some courts consider the ministerial exception to be jurisdictional in nature, and therefore view a motion to dismiss under Rule 12(b)(1) as the proper mechanism for asserting the exception,[16] other courts opine that where the exception applies, the plaintiff fails to state a claim under Rule 12(b)(6).[17] For the reasons stated in the margin, we conclude that the ministerial exception is properly raised in a Rule 12(b)(6) motion.[18] We therefore review Petruska's complaint under that rule.

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[16] *See, e.g., Alicea-Hernandez*, 320 F.3d at 701; *Young*, 21 F.3d at 185.

[17] *See, e.g., Werft*, 377 F.3d at 1100; *Minker v. Baltimore Annual Conf. of United Methodist Church*, 894 F.2d 1354, 1356 (D.C. Cir. 1990).

[18] At issue in a 12(b)(1) motion is the court's "very power to hear the case." *Mortensen v. First Federal Sav. and Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977). A 12(b)(6) motion, by contrast, tests the legal sufficiency of a plaintiff's claim. The question is whether the plaintiff has stated a cause of action. In that respect, as the Tenth Circuit noted *in Bryce v. Episcopal Church in the Diocese of Colorado*, 289 F.3d 648, 654 (10th Cir. 2002), the assertion of the ministerial exception – or, in that case, the "church autonomy doctrine" – is akin to a government official's defense of qualified immunity, which is often raised in a 12(b)(6) motion. *Id.* The exception may bar the plaintiff's causes of action, but it does not affect the court's authority to consider them.

Although *McClure*, the case that first articulated the ministerial exception, spoke of it in jurisdictional terms, the Court based the exception on an interpretation of § 703 of Title VII, 42 U.S.C. § 2000e-2, the provision under which the plaintiff brought suit. 460 F.2d at 555-56, 560-61. Section 703 does not confer jurisdiction but instead creates a right of action for sex discrimination. Because the ministerial exception is a limitation on § 703, and because § 703 creates a right of action, it follows that the ministerial exception restricts a plaintiff's right of action, not a court's jurisdiction.

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So construing the motion to dismiss, we have jurisdiction under 28 U.S.C. § 1291. *See Jordan v. Fox Rothschild O'Brien & Frankel, Inc.*, 20 F.3d 1250, 1261 (3d Cir. 1994). Our review is plenary. *Id.* Petruska's allegations, and all reasonable inferences that can be drawn from them, must be deemed true and must be viewed in the light most favorable to her. *See Evancho v. Fisher*, 423 F.3d 347, 350-351 (3d Cir. 2005).

Petruska's complaint alleges that she was demoted because she is a woman. The complaint states that Gannon's acting President, Thomas Ostrowski, told Petruska that she was to be demoted "*solely* on the basis of her gender." (emphasis added).

When a religious organization fires or demotes a woman on the basis of sex, it may be acting according to religious belief, religious doctrine, or church regulation (consider, for example, the Catholic Church's prohibition of female priests). In such a case, the religious organization would be immune from a Title VII suit. But a religious institution might also fire a woman because the individuals making the decision are, simply put, sexist. Religious doctrine and internal church regulation play no role in such a decision.

Considering the complaint in the light most favorable to Petruska, we must conclude that this is the latter type of case: Under the pleadings, Petruska was fired due to

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Moreover, a federal court undoubtedly has the authority to review claims arising under federal law. *Elvig v. Calvin Presbyterian Church*, 375 F.3d 951, 955 (9th Cir. 2004) ("Federal question jurisdiction is statutorily established, giving district courts 'original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.' ").

sexism unmoored from religious principle. Nothing in the complaint suggests that, as a matter of Catholic doctrine, women cannot serve as university chaplains; indeed, Petruska was hired as Gannon's chaplain. The complaint alleges that sexism and sexual harassment at Gannon are rampant and points to no religious justification for this alleged state of affairs. Gannon's former President, David Rubino, admitted to having an affair with a subordinate. Another female employee accused Rubino of sexual harassment, forcing Gannon to settle her claim. The complaint further states that Gannon has a custom or practice of sex discrimination and that Gannon undertook a campaign to cover up the former President's sexual misconduct. Petruska alleges that Trautman has removed women from leadership positions in his Diocese due to their sex and that he has a reputation for being unable to work with women.

This case plainly presents the question whether a ministerial employee may bring suit under Title VII where the religious institution lacks a rationale for the employment action that is grounded in faith, doctrine, or internal regulation.[19] We now turn to this question.

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[19] Gannon's creation of a Vice President for Mission and Ministry position may be viewed as a decision pursuant to an internal regulation. Presumably, the new position was somehow written into Gannon's policies. However, we construe Petruska's complaint to allege that Gannon violated Title VII not by *creating* the position but by *installing* Rouch into the position, despite the fact that the new position gave duties to Rouch that formerly belonged to Petruska. After all, Title VII regulates not an organization's power to chose its own structure or to create new positions but its ability to install particular individuals into those positions. Gannon has cited no explanation grounded in religious belief, religious doctrine, or internal regulation for the decision to give to Rouch what had, in effect, been Petruska's job.

A.

Where a federal statute poses "a significant risk of infringing the First Amendment," we must consider whether there is "a permissible construction of the statute that avoids that risk." *Geary*, 7 F.3d at 327; *see also NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 507 (1979). If there is such a permissible construction, we adopt it, and do not reach the constitutional question. *See Geary*, 7 F.3d at 327.

Although *McClure*, 460 F.2d at 560-61, held that Title VII could be fairly construed not to apply to ministerial employees, the Fourth Circuit has held that Congress clearly expressed an intent to bring ministers within the reach of Title VII. *See Rayburn*, 772 F.2d at 1166. The plain language of Title VII's prohibition on sex discrimination extends to the employment of ministers by religious institutions.[20] Likewise, Title VII's retaliation provision, under which Petruska also brings suit, contains no exception for religious organizations. 42 U.S.C. § 2000e-3(a).

Furthermore, as the Fourth Circuit noted in *Rayburn*, § 702 of Title VII contains a limited exemption for "a religious corporation, association, educational institution, or society." 772 F.2d at 1166. However, the exemption is

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[20] Section 703 of Title VII provides:

> It shall be an unlawful employment practice for an employer –
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> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . . .

42 U.S.C. § 2000e-2.

restricted to the decision to employ "individuals of a particular religion" to perform work connected with the organization's activities. *See id.;* 42 U.S.C. § 2000e-1. Thus, Congress gave churches the explicit right to discriminate on the basis of religion, but declined to create a right to discriminate on the basis of sex or to retaliate against an employee for complaining of sex discrimination. *See Rayburn*, 772 F.2d at 1166-67.

Rayburn also concluded that Title VII's "legislative history reinforces the plain meaning of the statutory text." *Id.* at 1167. Congress repeatedly considered and recalibrated the limited exemption for religious employers, but never gave such employers the power to discriminate on the basis of sex. As originally passed by the House in 1964, Title VII entirely exempted religious corporations, associations, or societies.[21] The final version, however, limited the exemption to discrimination on the basis of religion against employees involved in "religious activities."[22] In 1972, the exemption was broadened by deleting the word "religious" before "activities."[23] However, the Senate rejected a proposal that would have expanded the exemption so far as to prohibit all Title VII suits against religious organizations.[24] Finally, the section-by-section

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[21] *Rayburn*, 772 F.2d at 1167. (citing H.R. Rep. No. 914, 88th Cong., 2d Sess. (1964), *reprinted in* 1964 U.S. Cong. & Admin. News 2355, 2391, 2402).

[22] *Id.* (citing P.L. 88-352, Title VII, § 702, 78 Stat. 241, 255 (July 2, 1964), *reprinted in* 1964 U.S. Cong. & Admin. News 287, 304).

[23] *Id.* (citing P.L. 92-261 § 3, 86 Stat. 103-104 (March 24, 1972)).

[24] *See* Subcommittee on Labor of the Committee on Labor and Public Welfare of the United States Senate, Legislative History of the Equal Employment Opportunity Act of 1972 (Comm. Print 1972), at 376, 881, 1229-1230, 1258-1260, *cited in Rayburn*, 772 F.2d at 1167.

analysis of the Equal Employment Opportunity Act of 1972 stated that religious organizations "remain subject to the provisions of Title VII with regard to race, color, *sex* or national origin."[25]

In light of the foregoing analysis, we agree with the Fourth Circuit that the ministerial exception must derive directly from the Constitution, and not from Title VII.

B.

Under the terms of Title VII, a woman denied admission to the priesthood could sue the Catholic Church for sex discrimination. However, it is clear that Title VII cannot constitutionally extend to discrimination based on religious belief, religious doctrine, or church regulation.[26] Preventing a church from hiring ministers in accordance with its own beliefs would inhibit its ability to put its doctrines into practice and would therefore violate the Free Exercise Clause. Furthermore, such litigation would entangle courts in religious matters, in violation of the Establishment Clause.

This case, however, is about something completely different. Petruska alleges that she was demoted because of animus against women that had nothing to do with religious beliefs, religious doctrine, or internal regulation.

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[25] Section-by-Section Analysis of H.R. 1746, the Equal Employment Opportunity Act of 1972, *reprinted in* Legislative History of the Equal Employment Opportunity Act of 1972, at 1844, 1845, *cited in Rayburn*, 772 F.2d at 1167 (emphasis added).

[26] By "church regulation," we mean the internal rules under which a religious institution operates.

While several of our sister circuits have opined that the employer's reasons are irrelevant to the ministerial exception, *see supra* pp. 10-11, we conclude that these reasons make all the difference. The Constitution protects religious exercise,[27] and we decline to turn the Free Exercise Clause into a license for the free exercise of discrimination unmoored from religious principle.[28] We therefore conclude that under the Free Exercise Clause the ministerial exception will not bar Title VII claims by ministerial employees when an employment decision is not motivated by religious belief, religious doctrine, or church regulation. This version of the ministerial exception also comports with the Establishment Clause because courts will not be forced to consider religious questions, a process that would entangle the government in religious affairs.

1.

The Supreme Court has not addressed the ministerial exception, but our sister circuits have purported to derive it from Supreme Court cases that discuss the importance of church autonomy. However, the church autonomy cases protect a particular type of liberty: the right of a church to

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[27] *See, e.g.*, *City of Boerne v. Flores*, 521 U.S. 507, 564 (1997) (O'Connor, J., dissenting) ("[T]he Free Exercise Clause is properly understood as an affirmative guarantee of the right to participate in *religious activities* without impermissible governmental interference.") (emphasis added).

[28] According to a leading scholar of the religion clauses, "[t]o grant First Amendment immunity to . . . religious organizations in circumstances where its actions were not dictated by religious belief . . . is to invite misbehavior. Moreover, it seems unfair to deprive the poorly treated and now-estranged employee of any opportunity to bring the religious entity to account. . . . " Marci A. Hamilton, *God vs. the Gavel: Religion and the Rule of Law* 196 (2005).

construe its own laws, regulations, and beliefs free of judicial interference. Because Title VII is a secular federal law as opposed to an internal ecclesiastical law, and because Gannon has offered no religious rationale for Petruska's demotion, the church autonomy cases do not apply.

Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976), stands for the proposition that a plaintiff cannot sue a church for departing from or misapplying its own laws and regulations. In *Milivojevich*, the Supreme Court of Illinois set aside a Bishop's removal and defrockment and the reorganization of a Diocese. *Id.* at 708. Critically, the basis for the state court's decision was that the church violated its own internal regulations, including its constitution and penal code. *Id.* at 708, 712-13. The Supreme Court held that the First Amendment barred the state court's inquiries into whether church proceedings were "procedurally and substantively defective *under the internal regulations of the Mother Church.*" *Id.* at 698 (emphasis added).

Similarly, in *Gonzalez v. Roman Catholic Archbishop of Manilla*, 280 U.S. 1 (1929), the Court declined to overrule a church's interpretation of ecclesiastical law. An archbishop refused to appoint the plaintiff to a hereditary chaplaincy created by a trust, and the plaintiff sought a judgment declaring him the legal heir. *Id.* at 10-12. The archbishop's decision was based on provisions of the *Codex Juris Canonici*, which stated that to be eligible for a chaplaincy, one must have begun the study of theology. *Id.*

at 13-14. The Court refused to overrule the archbishop's construction of ecclesiastical law. *Id.* at 16.[29]

Watson v. Jones, 80 U.S. (13 Wall.) 679 (1872), applies the same principle. The *Watson* Court "was asked to decree the termination of an implied trust because of departures from doctrine." *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 445 (1969). As the *Watson* Court stated, "whenever *the questions of discipline, or of faith, or ecclesiastical rule, custom, or law* have been decided" by church tribunals, "the legal tribunals must accept such decisions as final, and as binding on them." 80 U.S. at 727.[30]

Thus, the Supreme Court's church autonomy cases protect a religious institution's freedom to interpret its own laws and internal regulations. However, entirely separate questions are raised by the application of federal laws, such as Title VII, to a church.[31] In contrast to an

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[29] Additionally, *Gonzalez* has nothing to do with the First Amendment: It was decided based on the terms of the trust, and without reference to the Constitution. *See Milivojevich*, 426 U.S. at 729-30 (Rehnquist, J., dissenting).

[30] *Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church in N. Am.*, 344 U.S. 94 (1952), is also inapposite. *Kedroff* involved a dispute between the Moscow-based Russian Orthodox Church and its North American branch over the right to use and occupy a cathedral. *Id.* at 95-97. A New York law aimed to strengthen the North American branch at the expense of the Moscow-based church. *See Kedroff*, 344 U.S. at 109. The Supreme Court invalidated the New York statute largely because it was designed "for the benefit of one segment of a church" at the expense of another. *Id.* at 119. Thus, *Kedroff* stands for the familiar proposition that the state may not favor one religious group over another, a principle that has no relevance to this case.

[31] As *Milivojevich* recognizes, secular courts lack the expertise and authority necessary to interpret church law. Indeed, if a secular court

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internal church law, Title VII, like any federal law, falls squarely within the ken of the federal judiciary.

In fact, in a separate line of cases addressing church property disputes, the Supreme Court has repeatedly stated that churches must adhere to laws, like Title VII, that are neutral and of general applicability.[32] The Court has even stated that this principle extends to employment laws: "The neutral-principles approach cannot be said to 'inhibit' the free exercise of religion, any more than do other neutral provisions of state law governing the manner in which churches own property, *hire employees*, or purchase goods." *Jones*, 443 U.S. at 606 (emphasis added).

In *Presbyterian Church*, 393 U.S. at 443-44, a Georgia court instructed a jury to resolve a church property dispute between a general church and a local church based on matters of religious doctrine. *Id.* The Supreme Court held that the Georgia court violated the First Amendment, which "commands civil courts to decide church property disputes *without resolving underlying controversies over religious doctrine.*" *Id.* at 449 (emphasis added). *Presbyterian Church*, however, leaves no doubt that religious

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reviewed a church's decision on a matter of church law, the appeal would be "from the more learned tribunal in the law . . . to one which is less so." 426 U.S. at 715 n.8 (quoting *Watson*, 80 U.S. (13 Wall.) at 729).

[32] The Supreme Court applies a similar principle to neutral laws of general applicability that incidentally burden the activities of an individual, as opposed to a church. *See Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 878-79 (1990) ("We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate. On the contrary, the record of more than a century of our free exercise jurisprudence contradicts that proposition.").

organizations are bound by neutral laws of general applicability that do not require inquiry into religious doctrine. As the Court stated, "there are neutral principles of law, developed for use in all property disputes, which can be applied without 'establishing' churches to which property is awarded." *Id.*

The following year, the Supreme Court reaffirmed *Presbyterian Church*, holding in *Maryland and Virginia Eldership of the Churches of God v. Church of God at Sharpsburg*, 396 U.S. 367, 367-68 (1970), that a Maryland court properly considered legal documents to resolve a church property dispute. The Court opined that "the Maryland court's resolution of the dispute *involved no inquiry into religious doctrine.*" *Id.* at 368 (emphasis added).

In *Jones*, the Court yet again stated that religious organizations are bound by secular laws, so long as those laws do not require inquiry into religious doctrine: "[A] State may adopt *any* one of various approaches for settling church property disputes so long as it involves no consideration of doctrinal matters, whether the ritual and liturgy of worship or the tenets of faith." 443 U.S. at 602 (quotation omitted).[33] Indeed, courts applying neutral laws of general applicability to religious institutions remain "free . . . completely from entanglement in questions of religious doctrine, polity, and practice." *Id.* at 603.

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[33] Jones further states: "We cannot agree . . . that the First Amendment requires the States to adopt a rule of compulsory deference to religious authority in resolving church property disputes, *even where no issue of doctrinal controversy is involved.*" *Id.* at 605 (emphasis added).

Because Petruska brings suit under Title VII, the rule of *Presbyterian Church, Maryland and Virginia Churches*, and *Jones* will bar her suit only if an inquiry into matters of religious doctrine is required. Here, nothing in the complaint suggests that Petruska's demotion was based on religious belief, religious doctrine, or internal church regulation. At this stage, and as we explain more fully in the following sections, the case requires no inquiry into religious doctrine.

2.

We now turn to the rationales that other courts have used to justify the ministerial exception, inquiring whether these rationales support an exception that applies without regard to the motivation for an employment decision. As discussed above, *see supra* pp. 12-15, courts have offered three explanations of why the Constitution might require the ministerial exception. We address these arguments in turn.

First Rationale: Government Scrutiny

Some of our sister circuits have opined that the ministerial exception is necessary to avoid government scrutiny of religious affairs. *See supra* p. 13. This argument derives largely from *Catholic Bishop*, where the Supreme Court held that the NLRB lacked jurisdiction to order collective bargaining between teachers and church-operated schools. The Supreme Court's holding was based largely on the concern that NLRB supervision would entangle the government with religious schools, in violation of the Establishment Clause. *See Catholic Bishop*, 440 U.S. at 501-04.

In *Geary*, however, we distinguished *Catholic Bishop* and held that a non-minister could bring a Title VII suit against a religious employer. We explained that employment discrimination laws, at least as applied to a non-minister, require far less scrutiny of religious affairs than NLRB supervision of religious schools. In an employment discrimination case, "[t]he secular tribunal merely asks whether a sincerely held religious belief actually motivated the institution's actions. The institution, at most, is called upon to explain the application of its own doctrines." *Geary*, 7 F.3d at 330.[34]

Following *Catholic Bishop* and *Geary*, we must decide whether allowing Petruska's suit to proceed would lead to excessive judicial scrutiny of Gannon. In considering this question, we take into account the principle articulated by the Supreme Court in the church autonomy and church property cases: A secular court must not resolve issues of religious belief, religious doctrine, or internal church regulation. Applying this principle, we ask not whether courts will be required to consider the affairs of a church in general, but whether courts will be forced to decide matters that Supreme Court precedent places beyond judicial scrutiny.

At this stage of the litigation, we cannot say that the case will require examination of religious belief, religious doctrine, or internal church regulation. Indeed, it is

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[34] *See also DeMarco v. Holy Cross High School*, 4 F.3d 166, 169-70 (2d Cir. 1993) ("While the NLRB is 'continuously involved in the enforcement of collective bargaining agreements and resolution of labor disputes,' ADEA actions do not require extensive or continuous administrative or judicial intrusion into the functions of religious institutions.") (citations omitted).

entirely possible that Gannon will continue not to offer a religious justification for Petruska's demotion. In such event, the decisive question for the District Court or the jury will be whether Petruska was demoted due to her gender, and this question will remain independent of religious matters.

Alternatively, Gannon may offer an explanation for Petruska's demotion that is grounded in religious principles or internal church regulations. The mere assertion of either type of explanation would not necessarily require the dismissal of Petruska's claims.

We imagine that the justification could take two forms. First, Gannon might argue that Petruska was demoted for reasons independent of gender discrimination. For example, Gannon might assert that Petruska was demoted for failing to attend mass, in contravention of Catholic doctrine.[35] Alternatively, Gannon might concede that it discriminated against Petruska on the basis of gender but assert that the discrimination was grounded in religious doctrines or internal regulations. For example, and again speaking in the hypothetical, Gannon might contend that Catholic doctrine does not allow female university chaplains.

In the first type of case, the task of the District Court or the jury would be to determine whether the challenged employment action was motivated by the proffered religious doctrine or by sex discrimination. As in *Geary*, the employee could not "challenge the validity, existence or 'plausibility'" of the religious doctrine itself. *See Geary*, 7

[35] This example is purely illustrative, and is not based on the record.

F.3d at 330. However, the employee could contend that the asserted religious rationale "did not in fact motivate" the adverse employment action. *Id.*

For example, if Gannon contended that Petruska did not attend mass, she would be precluded from asserting that Catholic doctrine did not require her to do so. She could, however, argue that she was not actually demoted for failing to attend mass. By way of illustration, she could substantiate her allegations that Ostrowski told her that she was being demoted solely on the basis of her gender and that Trautman sought to "clean house" by removing women from leadership positions. Petruska might also cite evidence that in the past male chaplains who refused to attend mass did not suffer adverse employment action. To determine whether this evidence demonstrated gender discrimination, a factfinder would not have to delve into religious questions. As we stated in *Geary*, "[a] conclusion that the religious reason did not in fact motivate dismissal would not implicate entanglement since that conclusion implies nothing about the validity of the religious doctrine or practice." *Id.*

Gannon might instead concede that it demoted Petruska on the basis of gender but contend that the discrimination was motivated by religious doctrine or internal regulation. The factfinder's task would then be to determine whether the discrimination was indeed motivated by religious principles or church regulations; if so, the ministerial exception would bar the claim. Petruska could not challenge the validity of the asserted doctrine. Thus, if Gannon asserted that Catholicism forbids female university chaplains, Petruska could not contend otherwise. Furthermore, Petruska could not prevail merely by pointing to evidence of sex discrimination, since such

discrimination, if religiously motivated, would be beyond judicial scrutiny. Still, it is conceivable that Petruska could cite evidence that she was demoted due to discrimination without any religious basis. For example, she might present evidence that the decisionmakers *said* that they had no religious reason to discriminate against her. In assessing evidence of this nature, the factfinder would not have to decide religious questions.

If Gannon offers either type of religious rationale, the District Court may be constitutionally required to limit discovery or exclude evidence designed to call into question the validity, existence, or plausibility of the religious doctrine. For example, if Gannon argued that Petruska was demoted for failure to attend mass, Petruska obviously would not be allowed to question the doctrine by citing church law or the Bible. In this regard, we find the D.C. Circuit's discussion of a minister's contract claim instructive:

> It could turn out that in attempting to prove his case, appellant will be forced to inquire into matters of ecclesiastical policy . . . . Of course, in that situation, a court may grant summary judgment on the ground that appellant has not proved his case and pursuing the matter further would create an excessive entanglement with religion. On the other hand, it may turn out that the potentially mischievous aspects of [appellant's] claim are not contested by the Church or are subject to entirely neutral methods of proof. The speculative nature of our discussion here demonstrates why it is premature to foreclose appellant's . . . claim. Once evidence is offered, the district court will be in a position to control the case so as to protect against any impermissible entanglements.

Minker v. Baltimore Annual Conf. of United Methodist Church, 894 F.2d 1354, 1360 (D.C. Cir. 1990).[36]

We recognize that this process will often require a nuanced analysis of whether a piece of evidence calls religious doctrines into question, but we are confident that the excellent district courts in this Circuit are up to the task.[37] Moreover, the possibility that courts in this case will have to make fine distinctions in the future is not a sufficient reason to foreclose Petruska's suit now. After all, when we restrict the reach of a statute so as to preserve the Constitution, we must cut with a scalpel, not a butcher's knife.[38] Therefore, Petruska's claims may – or may not – present constitutional problems later on, and we will not bar them now based on mere speculation.

Although Gannon "would be *likely* to defend its employment action on grounds related to church needs rooted in church doctrine," *see Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1040 (7th Cir. 2006) (emphasis added), and although this defense might require limiting

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[36] *See also Bollard*, 196 F.3d at 950 ("The limited nature of the inquiry, combined with the ability of the district court to control discovery, can prevent a wide-ranging intrusion into sensitive religious matters.").

[37] *See DeMarco*, 4 F.3d at 172 ("[W]e are confident that the able district judge will be able to focus the trial upon whether DeMarco was fired because of his age or because of failure to perform religious duties, and that this can be done without putting into issue the validity or truthfulness of Catholic religious teaching.").

[38] As the Supreme Court has recently reminded us, "we must 'refrain from invalidating more of [a] statute than is necessary.'" *See United States v. Booker*, 543 U.S. 220, 258 (2005) (quoting *Regan v. Time, Inc.*, 468 U.S. 641, 652 (1984)).

discovery or excluding certain evidence, we do not think that this possibility requires us to prophylactically disregard the command of Congress. Such an approach would risk foreclosing perfectly valid claims, thereby ignoring the will of Congress without a justification rooted in the Constitution. We will not, until we have a constitutional reason to do so, enfeeble "a law triggered by a Nation's concern over centuries of racial injustice and intended to improve the lot of those who had been excluded from the American dream for so long." *United Steelworkers of America v. Weber*, 443 U.S. 193, 204 (1979) (quotation omitted).

Second Rationale: Selection of Clergy

Aside from the "government scrutiny" rationale, which seeks to shield churches from government inquiry, examination, or probing, some courts have opined that the law should have no authority over a church's decision to fire a ministerial employee. *See supra* pp. 13-14. We agree with this argument, but only to a point. True, if a religious employer fired a ministerial employee for reasons related to faith, doctrine, or internal regulation, a judgment against the church would punish the church for expressing its beliefs. But where an employment decision is devoid of religious or doctrinal content, and is based solely on sexism, we fail to see how the decision relates to the free exercise of religion.

Let us assume that a male applicant and a female applicant for a ministerial position have identical religious views, that they are equally qualified, and that there is no religious reason to chose one over the other. Let us further assume that the decisionmaker chooses

the male candidate due to sexism that is utterly unconnected to his religious beliefs. In such a case, we do not think that allowing the female candidate to bring suit under Title VII would infringe the religious autonomy of the church.

Critically, a host of statutory and constitutional protections continue to guarantee a church's freedom to select ministers for religious reasons. First, religious institutions retain the right to fire ministers for conduct inconsistent with religious precepts or for membership in the wrong religion. *See Little*, 929 F.2d at 951. Second, as we have mentioned, religious institutions may even practice race and sex discrimination that is otherwise illegal, so long as the discrimination is grounded in religious doctrine or internal regulation. Third, a plaintiff cannot challenge the validity or existence of religious doctrines in the course of litigation.[39] Under the rule we now adopt, religious institutions lose only the power to fire ministerial employees for secular reasons, a power unrelated to the exercise of religion.

Third Rationale: Inquiry into Religious Doctrine

Finally, other Courts of Appeals have opined that the ministerial exception prevents judicial inquiry into

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[39] We also note that because Petruska seeks only monetary damages, her suit does not threaten to alter the composition of Gannon's ministerial staff. *See Bollard*, 196 F.3d at 950 (holding that the ministerial exception did not bar a sexual harassment suit against a religious institution, where the plaintiff sought only damages); *Minker*, 894 F.2d at 1360 ("[A]s the remedy would be limited to the award of money damages, we see no potential for distortion of church appointment decisions. . . . ").

matters of religious doctrine. *See supra* pp. 14-15. In light of our discussion thus far, little remains to be said. At this point in the litigation, we cannot conclude that Petruska's claims will raise questions of a religious nature, requiring secular courts to "tak[e] on the additional role of religious courts, as if the United States were a theocracy." *Tomic*, 442 F.3d at 1042.

In sum, neither Supreme Court precedent nor the arguments advanced by our sister circuits supports a ministerial exception that applies without regard to the reason for an employment decision. We therefore reverse the dismissal of Petruska's Title VII sex discrimination claim.

IV.

Independent of her sex discrimination claim, Petruska also alleges that she was demoted in retaliation for opposing sexual harassment at Gannon.[40] We apply the same analysis to the retaliation claim as to the sex discrimination claim, inquiring whether the complaint alleges that the retaliation was based on religious belief, religious doctrine, or internal church regulation. There is no indication that a doctrine or regulation prohibits opposing sexual harassment or questioning sexual harassment policies.

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[40] To repeat, Petruska alleges that she opposed limiting the time frame during which a Gannon employee could file a sexual harassment grievance with the university; helped prepare a report criticizing the university's sexual harassment policies; played a pivotal role in notifying Ostrowski and Trautman that Rubino had sexually harassed a Gannon employee for several years; and opposed Trautman's decision to allow a former Gannon priest, who had been terminated for sexual misconduct toward students, to enter the university's campus.

Therefore, at this stage, and for the reasons stated above, the claim does not collide with Gannon's free exercise rights or entangle secular courts in religious questions. Accordingly, we reverse the District Court's dismissal of Petruska's Title VII retaliation claim.

V.

Aside from her Title VII claims, Petruska's complaint also contains four state law claims: breach of contract, civil conspiracy, negligent supervision and retention, and fraudulent misrepresentation. While the ministerial exception as such applies only to Title VII, courts have applied similar doctrines to restrict state law claims arising out of the employment relationship between a religious organization and a ministerial employee.

Like every court to decide the issue, we conclude that the First Amendment bars state law claims that require an interpretation of religious belief, religious doctrine, or internal church regulation.[41] On the other hand, courts

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[41] To allow a secular court to inquire into such matters would contravene *Milivojevich*, which forbids examination of "matters of discipline, faith, internal organization, or ecclesiastical rule, custom, or law." 426 U.S. at 713. Applying Milivojevich, the First Circuit dismissed a plaintiff's claim that he was discharged in violation of procedures "articulated in [a church's] General Constitution, certain Auxiliary Constitutions, and a variety of bylaws, rules, and regulations." *Natal v. Christian and Missionary Alliance*, 878 F.2d 1575, 1576 (1st Cir. 1989). Similarly, in *Lewis v. Seventh Day Adventists Lake Region Conference*, 978 F.2d 940, 943 (6th Cir. 1992), the Sixth Circuit dismissed state law claims where the employee asserted that his dismissal was based "on a misapplication of [church] procedures and laws." *See also Hutchison v. Thomas*, 789 F.2d 392, 393 (6th Cir. 1986) (dismissing contract claim based on *The Discipline*, a collection of Methodist "rules, laws, and doctrinal statements").

have held that the religion clauses permit state law employment claims that do not require inquiry into such matters. In *Minker*, a Methodist minister asserted two contract claims against the United Methodist Church: (1) breach of promises to find him a more suitable congregation and (2) violation of the Book of Discipline, a statement of church law. 894 F.2d at 1355-56. The Court held that the religion clauses barred the Book of Discipline claim, which would require interpreting "matters of essential religious dogma." *Id.* at 1358. However, the Court permitted the oral promise claim, which did not require inquiry into such matters. The Court reasoned that "[a] church is always free to burden its activities voluntarily through contracts, and such contracts are fully enforceable in civil court." *Id.* at 1359.[42]

Applying the reasoning of *Minker*, we ask whether, at this stage of litigation, each of Petruska's state law claims requires an examination of matters of faith, doctrine, or internal regulation.

A. Breach of Contract

Petruska alleges that Gannon, by demoting her, breached her contract to serve as chaplain for three years. At this stage, we cannot assume that interpreting

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[42] Similarly, the Eighth Circuit reversed the dismissal of a minister's state law employment claims, reasoning, "[a]t the present stage of this litigation we are unable to predict that the evidence offered at trial will definitely involve the district court in an impermissible inquiry into . . . bylaws or religious beliefs." *Drevlow v. Lutheran Church*, 991 F.2d 468, 471 (8th Cir. 1993); *see also Rayburn*, 772 F.2d at 1171 ("Like any other person or organization, [churches] may be held liable for their torts and upon their valid contracts.").

Petruska' s contract will give rise to questions of religious belief, religious doctrine, or internal church regulation.[43] *See Drevlow v. Lutheran Church*, 991 F.2d 468, 471 (8th Cir. 1993). Accordingly, we reverse the dismissal of Petruska's breach of contract claim.

B. Fraudulent Misrepresentation

Petruska's fraudulent misrepresentation claim is based on (1) Gannon's representations that it is an equal opportunity employer and (2) Rubino's assurance at the time of Petruska's promotion to chaplain that her tenure would reflect her performance as opposed to her gender. At least at the outset, Petruska's fraudulent misrepresentation claim "do[es] not inevitably or even necessarily lead to government inquiry into [Gannon's] religious mission or doctrines." *Geary*, 7 F.3d at 329.

While the religion clauses do not bar Petruska's fraudulent misrepresentation claim, she has failed to plead fraud with sufficient particularity under Federal Rule of Civil Procedure 9(b).[44] We therefore affirm the District Court's dismissal of this claim.

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[43] In alleging that she was removed as chaplain, Petruska alludes to Gannon's Policies and Procedures Manual, which lists the duties of the chaplain. Presumably, the manual is a statement of Gannon's internal regulations. On remand, the religion clauses may bar Petruska from citing the manual as evidence of her breach of contract claim, for in order to evaluate such evidence, the factfinder might have to consider questions of internal church regulation.

[44] *See Christidis v. First Pennsylvania Mortg. Trust*, 717 F.2d 96, 99 (3d Cir. 1983) (stating that the requirements of Rule 9(b) "appl[y] not only to fraud actions under federal statutes, but to fraud claims based on state law.").

C. Negligent Supervision and Retention and Civil Conspiracy

Petruska's negligent supervision and retention claim and her civil conspiracy claim flow directly from her Title VII allegations. Civil conspiracy requires proof that two or more persons combined to do an unlawful act or to do an otherwise lawful act by unlawful means. *See, e.g., Thompson Coal Co. v. Pike Coal Co.*, 488 Pa. 198, 211 (Pa. 1979). Here, the underlying unlawful acts are the very violations of Title VII discussed in the previous sections.

Likewise, Petruska's negligent supervision and retention claim flows from her Title VII allegations: She claims that Gannon negligently supervised and retained the employees who discriminated against her. Gannon has not asserted a reason for the retention of these employees that is grounded in faith, doctrine, or internal regulation.

As a corollary to our conclusion that Petruska must be allowed to proceed with her Title VII claims, we hold that at this stage the First Amendment does not foreclose her conspiracy and negligent supervision and retention claims. We therefore reverse the District Court's dismissal of these claims.

VI.

At this stage of litigation, Petruska's claim offends neither the Free Exercise Clause nor the Establishment Clause. We therefore hold that the religion clauses do not bar Petruska's causes of action, and we reverse the dismissal of all claims, with the exception of the fraudulent misrepresentation claim. We stress that constitutional defects in Petruska's causes of action may emerge as the

case proceeds, and that the District Court must avoid them scrupulously, applying the guidance we have provided.[45] Ultimately, the constitutional concerns that lurk at the periphery of this case may defeat Petruska' s claims. But that is a question for another day.

SMITH, J., *concurring in part and dissenting in part.*

Although the majority professes to adopt a "carefully tailored version of the ministerial exception" to Title VII, Maj. Op. at 3, in fact, by treating ministers like lay employees, it effectively refuses to recognize any ministerial exception, placing this Court at odds with every other federal court of appeals to consider the issue. The majority holds that "where a church discriminates for reasons unrelated to religion, . . . the Constitution does not foreclose Title VII suits." Maj. Op. at 4. It concludes that because Gannon has not – or at least not yet – articulated a "religious belief, religious doctrine, or internal regulation" as a basis for its decision to restructure, adjudication of Petruska's claims does not offend the First Amendment. *Id.* I disagree with the majority's fundamental premise that a church's choice regarding who performs particular spiritual functions is not necessarily a religious decision. Rather, in my view, such a decision is, by its very nature, a religious one. Consequently, government interference with that decision necessarily infringes on a church's free

[45] We reject Petruska's argument that Gannon waived the ministerial exception as a defense. *See Tomic*, 442 F.3d at 1042 ("[T]he ministerial exception . . . is not subject to waiver or estoppel . . . . A federal court will not allow itself to get dragged into a religious controversy even if a religious organization wants it dragged in."). Because Gannon did not waive the ministerial exception, Gannon may assert the exception, as defined by this opinion, in further proceedings.

exercise of religion and entangles the courts in religious matters. I would therefore apply the ministerial exception to any claim which limits a church's right to choose who will perform particular spiritual functions, without regard to whether it articulates an independent justification based on "religious belief, religious doctrine, or internal regulation."

I agree with the majority's conclusion that Gannon's motion to dismiss is properly considered under Federal Rule of Civil Procedure 12(b)(6) and that Petruska failed to allege fraudulent misrepresentation with sufficient specificity under Federal Rule of Civil Procedure 9(b). Accordingly, I concur in the introduction of Part III and in Part V.B. of the Opinion. I also agree that adjudication of Petruska's breach of contract claim would not violate the First Amendment, and therefore likewise concur in Part V.A. However, because Petruska's own complaint establishes that her primary duties included spiritual functions and because her Title VII, civil conspiracy, and negligent supervision and retention claims implicate the church's right to select its spiritual leaders, I would hold that these claims are barred by the ministerial exception. I therefore respectfully dissent.

I.

The First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." U.S. Const. amend. I. The Religion Clauses extend to both legislative and judicial action, *see Kreshik v. Saint Nicholas Cathedral of Russian Orthodox Church of North Amer.*, 363 U.S. 190, 191 (1960), and apply equally

to state and federal laws, *see Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 8 (2004) (citing *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940)). The Free Exercise Clause protects both the "right to believe and profess whatever religious doctrine one desires," *Employment Division, Dep't of Human Resources v. Smith*, 494 U.S. 872, 877 (1990), and the right of religious institutions to decide "matters of church government" as well as questions of "discipline, faith, internal organization, or ecclesiastical rule, custom, or law." *See Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952); *Serbian Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 713 (1976). The Establishment Clause, by contrast, prohibits government action that serves to advance or inhibit religion or that results in excessive entanglement "in questions of religious doctrine, polity, and practice." *See Jones v. Wolf*, 443 U.S. 595, 603 (1979); *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

The questions presented in this case are whether applying Title VII to Gannon's decision to restructure would infringe upon its free exercise rights and whether adjudication of Petruska's Title VII claims would result in unconstitutional entanglement under the Establishment Clause. Every circuit that has considered the issue has concluded that application of Title VII to a minister-church relationship would violate – or would risk violating – the First Amendment and, accordingly, has recognized some version of the ministerial exception.[46] To the extent that a

[46] *See, e.g., EEOC v. Roman Catholic Diocese of Raleigh*, 213 F.3d 795 (4th Cir. 2000); *Rayburn v. Gen'l Conf. of Seventh Day Adventists*, 772 F.2d 1164 (4th Cir. 1985); *Combs v. Central Texas Annual Conf. of the United Methodist Church*, 173 F.3d 343 (5th Cir. 1999); *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972); *Alicea-Hernandez v.*

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claim involves the church's selection of clergy – in other words, its choice as to who will perform particular spiritual functions[47] – most of these circuits have held that the

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Catholic Bishop of Chicago, 320 F.3d 698 (7th Cir. 2003); *Young v. Northern Illinois Conf. of United Methodist Church*, 21 F.3d 184 (7th Cir. 1994); *Scharon v. St. Luke's Episcopal Presbyterian Hosp.*, 929 F.2d 360 (8th Cir. 1991); *Elvig v. Calvin Presbyterian Church*, 375 F.3d 951 (9th Cir. 2004); *Bollard v. Soc'y of Jesus*, 196 F.3d 940 (9th Cir. 1999); *Gellington v. Christian Methodist Episcopal Church*, 203 F.3d 1299 (11th Cir. 2000); *EEOC v. Catholic Univ. of Amer.*, 83 F.3d 455 (D.C. Cir. 1996); *see also Starkman v. Evans*, 198 F.3d 173 (5th Cir. 1999) (applying ministerial exception to Americans with Disabilities Act claim); *Werft v. Desert Southwest Annual Conf. of the United Methodist Church*, 377 F.3d 1099 (9th Cir. 2004) (same).

The First Circuit also addressed the application of the First Amendment to a minister's claims in *Natal v. Christian Missionary Alliance*, 878 F.2d 1575 (1st Cir. 1989) Although the case involved state law claims rather than any federal employment discrimination law, the Court made clear that inquiry into allegations related to a minister's employment would be barred by the First Amendment. Specifically, it explained:

> Because of the difficulties inherent in separating the message from the messenger – a religious organization's fate is inextricably bound up with those whom it entrusts with the responsibilities of preaching its word and ministering to its adherents – Natal's case necessarily falls within the scope of the Court's monition. By its nature, the inquiry which Natal would have us undertake into the circumstances of his discharge plunges an inquisitor into a maelstrom of Church policy, administration, and governance. It is an inquiry barred by the Free Exercise Clause.

Id. at 1578.

[47] In evaluating whether a particular employee is subject to the ministerial exception, other circuits have concluded that the focus should be on the "function of the position." *Rayburn*, 772 F.2d at 1168. As a general rule, an employee will be considered a minister if her primary duties include "teaching, spreading the faith, church governance, supervision of a religious order, or supervision of participation in religious ritual and worship." *Id. at* 1169; *see, e.g., Alicea-Hernandez*, 320 F.3d at 703 (applying ministerial exception to Hispanic Communications

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exception bars any inquiry into a religious organization's underlying motivation for the contested employment decision.[48] I would likewise hold.

Director who functioned as a "press secretary" for the church); *Starkman*, 198 F.3d at 175-76 (holding that Choir Director at Methodist church was minister for purposes of First Amendment analysis); *Catholic Univ.*, 83 F.3d at 455 (applying exception to professor of canon law at Catholic University). Although I do not view this list as exclusive, I agree that the focus on the function of an employee's position is the proper one.

[48] *See Rayburn*, 772 F.2d at 1169 ("[T]he free exercise clause of the First Amendment protects the act of a decision rather than a motivation behind it. In these sensitive areas, the state may no more require a minimum basis in doctrinal reasoning than it may supervise doctrinal content"); *Combs*, 173 F.3d at 350 ("We cannot conceive how the federal judiciary could determine whether an employment decision concerning a minister was based on legitimate grounds without inserting ourselves into a realm where the Constitution forbids us to tread."); *Young*, 21 F.3d at 186 (quoting *Rayburn*, 772 F.2d at 1169); *Scharon*, 929 F.2d at 363 ("Personnel decisions by church-affiliated institutions affecting clergy are *per se* religious matters and cannot be reviewed by civil courts for to review such decisions would require the courts to determine the meaning of religious doctrine and canonical law and to impose a secular court's view of whether in the context of the particular case religious doctrine and canonical law support the decision the church authorities have made. This is precisely the kind of judicial second-guessing of decision-making by religious organizations that the Free Exercise Clause forbids.") (citations omitted); *Bollard*, 196 F.3d at 947 (indicating that a "Jesuit order's choice of representative" is ordinarily "a decision to which we would simply defer without further inquiry"); *Minker*, 894 F.2d at 1357 (finding that court need not determine whether reasons for employment decision were "independently ecclesiastical in nature" to apply ministerial exception).

As the majority notes in footnote 6, "[a]lthough the Eleventh Circuit has recognized the ministerial exception, *see Gellington*, 203 F.3d 1299, it does not appear to address whether the exception applies without regard to motive." Maj. Op. at 13, n.6. Although I generally agree with the majority's characterization of *Gellington*, I note that the Eleventh Circuit seems to tacitly approve of a conclusion by the Fifth Circuit that "the constitutional protection of religious freedom afforded

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A.

The majority opines that adjudication of Petruska's claims would not violate the Free Exercise Clause – unless and until Gannon articulates a "religious belief, religious doctrine, or internal regulation" as a justification for its decision to restructure – because the Constitution protects only "religious exercise." Maj. Op. at 28 (citing *City of Boerne v. Flores*, 521 U.S. 507, 564 (1997) (O'Connor, J, dissenting)). I agree with the majority's basic premise that a church must be engaged in religious exercise in order to trigger protection under the Free Exercise Clause. In my view, however, the process of selecting a minister is *per se* a religious exercise. A minister is not merely an employee of the church; she is the embodiment of its message. A minister serves as the church's public representative, its ambassador, and its voice to the faithful. As the Fifth Circuit explained: "The relationship between an organized church and its ministers is its lifeblood. The minister is the chief instrument by which the church seeks to fulfill its purpose." *McClure v. Salvation Army*, 460 F.2d 553, 558-59 (5th Cir. 1972). Accordingly, "[m]atters touching this relationship must necessarily be recognized as of prime ecclesiastical concern." *Id.* at 559.[49]

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to churches in employment actions involving clergy exists even when such actions are not based on issues of church doctrine or ecclesiastical law." *Gellington*, 203 F.3d at 1303 (citing *Combs*, 173 F.3d at 350).

[49] In addition to their role within the religious organization, ministers also have a direct relationship with a church's members: Ministers marry their children and bury their parents; they act as their spiritual counselors and serve as their moral advisors. To these members, the selection of a minister is undoubtedly a question of religious concern.

As previously noted, the Free Exercise Clause protects two rights: the right to believe and profess matters of faith and the right of religious institutions to decide questions of governance and internal organization. In this case, those rights are interrelated.

First, like an individual, a church in its collective capacity must be free to express religious beliefs, profess matters of faith, and communicate its religious message. However, unlike an individual who can speak on her own behalf, the church as an institution must retain the corollary right to select its voice. Accordingly, any restriction of the church's right to choose who will carry its spiritual message necessarily infringes upon its Free Exercise right to profess its beliefs. This right is squarely at issue in Petruska's complaint.

The second right protected by the Free Exercise Clause – the church's right to decide matters of governance and internal organization – is also implicated by Gannon's decision to restructure. The majority contends that this right only protects "a religious institution's freedom to interpret its own laws and internal regulations." Maj. Op. at 31. Because Gannon has not identified an internal regulation or religious doctrine that required it to create the position of Vice President for Mission and Ministry and to hire Father Rouch to fill that position, the majority contends that the free exercise right to determine matters of governance and internal organization is not at issue. Maj. Op. at 29-31 (distinguishing *Serbian Eastern Orthodox v. Milivojevich*, 426 U.S. 696 (1976), *Gonzalez v. Roman Archbishop of Manila*, 280 U.S. 1 (1929), and *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1872)). I disagree.

The Vice President for Mission and Ministry and the University Chaplain at Gannon both serve spiritual functions – in other words, the primary duties of those employees include "teaching, spreading the faith, church governance, supervision of a religious order, or supervision of participation in religious ritual and worship."[50] *See Rayburn*, 772 F.2d at 1169. Accordingly, Gannon's decisions regarding who to install in those positions and the manner in which their duties would be divided were decisions about who would perform those constitutionally protected spiritual functions. Those choices are protected from governmental interference by the Free Exercise Clause.

The majority further opines that there is "no doubt that religious organizations are bound by neutral laws of general applicability that do not require inquiry into religious doctrine." Maj. Op. at 32-34 (citing *Jones v. Wolf*,

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[50] Petruska argues that she was not a "chaplain" as that term is understood in the Roman Catholic Church, nor did she have any written job requirements which specifically defined her position at the University. Nevertheless, Petruska's own complaint establishes that her primary duties involved ministerial functions. Among other things, Petruska alleges that she served as co-chair for the Catholic Identity Task Force, held prayer services, and was traditionally involved in planning liturgies. Moreover, as the District Court correctly noted, her own "performance objectives" included "develop[ing] strategies to increase participation in sacramental life of [the] Gannon community." It is clear from the face of Petruska's complaint that the functions she performed as University Chaplain were ministerial in nature.

With respect to the Vice President of Mission and Ministry position, Petruska alleges that Rouch was installed in that role and served in a supervisory capacity over the Chaplain's Division. To the extent that the Vice President of Mission and Ministry supervises spiritual functionaries, at least some of the functions he performs are, by definition, spiritual functions.

443 U.S. 595, 606 (1979); *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 445 (1969); *Maryland and Virginia Eldership of the Churches of God v. Church of God at Sharpsburg*, 396 US. 367, 367-68 (1970); *Employment Division, Dep't of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990)). The majority cites *Jones* for the proposition that "'[t]he neutral-principles approach cannot be said to 'inhibit' the free exercise of religion, any more than do other neutral provisions of state law governing the manner in which churches own property, *hire employees*, or purchase goods.'" Maj. Op. at 32 (citing *Jones*, 443 U.S. at 606) (emphasis in the majority opinion).

Title VII is indeed a neutral law of general applicability, and it undoubtedly applies to *lay* employment decisions by religious institutions. 42 U.S.C. § 2000e-2; 42 U.S.C. § 2000e-3; *but see* 42 U.S.C. § 2000e-1(a) (providing an exception for "religious corporation, association, educational institution, or society with respect to employment of individuals of a particular religion to perform work connected with the carrying on . . . of its activities); 42 U.S.C. § 2000e-2(e) (permitting religious educational institutions "to hire and employ employees of a particular religion"). However, because I view a church's selection of its *minister* as essential to the church's right to express religious beliefs, profess matters of faith, and communicate its religious message, I differ with the majority's conclusion that application of Title VII in this case does not violate the Free Exercise Clause. *See Catholic Univ.*, 83 F.3d at 463 ("We conclude from our review of the Supreme Court's jurisprudence that whereas the Free Exercise Clause guarantees a church's freedom to decide how it will govern

itself, what it will teach, and to whom it will entrust its ministerial responsibilities, it does *not* guarantee the right of its members to practice what their church may preach if that practice is forbidden by a neutral law of general application."). In reaching its conclusion that the language in *Jones* applies equally to lay employees and ministers, the majority has effectively refused to adopt the ministerial exception recognized in our sister courts of appeals. Because I agree with those courts that interference with a church's selection of clergy violates the First Amendment, I cannot join my colleagues in the majority.

B.

Although, in my view, the Free Exercise Clause bars any claim which limits a church's right to choose who will fulfill particular spiritual functions – in this case, Petruska's Title VII discrimination and retaliation, civil conspiracy, and negligent supervision and retention claims – I nevertheless address the Establishment Clause in response to the majority's treatment of that issue. The majority holds that, unless and until Gannon articulates a "religious belief, religious doctrine, or internal regulation" as a justification for its decision to install Father Rouch as Vice President of Mission and Ministry, there is no risk of unconstitutional entanglement under the Establishment Clause. I do not agree.

In *Lemon v. Kurtzman,* the Supreme Court set forth a three-prong test to determine the validity of a statute under the Establishment Clause: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; . . . and finally, the statute must not

foster 'an excessive government entanglement with religion.'" 403 U.S. 602, 612-13 (1971) (citations omitted). Only the entanglement prong is at issue with respect to Title VII.

Excessive entanglement would arise if our inquiry into Gannon's decision to restructure traversed questions of the validity of religious beliefs or practice. *See Geary,* 7 F.3d at 330. Because, as discussed above, a church's choice regarding who will perform its spiritual functions is inherently a religious decision, any inquiry into that decision would traverse such questions. Even though the decision here involves an individual act rather than general practice, the necessary inquiry – asking whether the church can justify its employment decision with reference to church doctrine – excessively entangles the court.

The majority relies on *Geary* to support its conclusion that application of Title VII in this case would not run afoul of the Establishment Clause. The decision in *Geary,* however, actually undermines the majority's position. The *Geary* Court, specifically distinguishes between decisions involving clergy and those involving lay employees.

In *Geary,* a fifty-year-old teacher was fired by the Catholic school that employed her. The school's stated reason for dismissal was that Geary had married a divorced man in violation of church doctrine. *Id.* We concluded that resolution of Geary's Age Discrimination in Employment Act claims would not offend the Establishment Clause because the inquiry was limited to whether the school discriminated against her on the basis of her age and canceled her insurance in retaliation for her initiation of legal proceedings. *Id.* Geary did not challenge

the validity of the religious doctrine; she merely claimed that the religious doctrine did not motivate the adverse employment action. *Id.* at 329. We held that "when the pretext inquiry neither traverses questions of the validity of religious beliefs nor forces a court to choose between parties' competing religious visions, that inquiry does not present a significant risk of entanglement" *Id.* at 330.

The *Geary* Court itself, however, distinguished cases involving members of the clergy, stating that "notwithstanding Geary's apparent general employment obligation to be a visible witness to the Catholic Church's philosophy and principles, a court could adjudicate Geary's claims *without the entanglement that would follow were employment of clergy or religious leaders involved.*" *Id.* at 331 (emphasis added). As we suggested in *Geary*, entanglement necessarily results when a court inquires into a decision regarding who performs spiritual functions on behalf of the church, because, unlike lay employees, that decision is inherently a religious matter. Again, notwithstanding the majority's claim that it is crafting a narrow ministerial exception, its failure to acknowledge the distinction drawn in *Geary* between lay employees and ministers is tantamount to a refusal to adopt any such exception.

II.

As described above, the ministerial exception should operate to bar any claims that limit a church's right to choose who will perform its spiritual functions. Accordingly, in this case, the relevant question with respect to each claim is whether application of the state or federal law will limit Gannon's right to choose who performs

particular spiritual functions on its behalf. Petruska asserts six claims in her First Amended Complaint: two violations of Title VII – discrimination and retaliation (Counts I and II, respectively); fraudulent misrepresentation (Count III); civil conspiracy (Count IV); breach of contract (Count V); and negligent supervision and retention (Count VI). I submit that resolution of Counts I, II, IV, and VI would impose unconstitutional limits on Gannon's First Amendment rights. Consequently, I would hold that they are barred by the ministerial exception.

A.

Petruska alleges that Gannon demoted and constructively discharged her from her position as University Chaplain based on her gender and retaliated against her on the basis of her opposition to sexual harassment at the University. Her discrimination and retaliation claims are premised upon Gannon's decision to restructure, a decision which Petruska argues was merely pretext for gender discrimination. It is clear from the face of Petruska's complaint, however, that Gannon's choice to restructure constituted a decision about who would perform spiritual functions and about how those functions would be divided. Accordingly, application of Title VII's discrimination and retaliation provisions to Gannon's decision to restructure would violate the First Amendment.[51] For that reason,

[51] I acknowledge that it may not always be clear whether a minister's Title VII claim involves "a church's decision regarding who will perform spiritual functions. For example, in *Elvig v. Calvin Presbyterian Church*, 375 F.3d 951, 955 (9th Cir. 2004), the Ninth Circuit considered a Presbyterian minister's claims that she was sexually harassed and subject to retaliation by her supervising pastor. The *Elvig* Court recognized that a church's decisions in selecting its

(Continued on following page)

Petruska's Title VII claims (Counts I and II) should be dismissed.

B.

Petruska's First Amended Complaint also contains three state tort claims: civil conspiracy, negligent supervision and retention, and fraudulent misrepresentation.[52] The civil conspiracy[53] and negligent supervision[54] claims

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clergy are protected by the First Amendment and held that to the extent that a plaintiff's claims implicated ministerial employment decisions, the claims were foreclosed. Nevertheless, over a vigorous dissent, the Court concluded that, in that case, the sexual harassment, hostile work environment, and retaliation claims (verbal abuse and intimidation) did not implicate protected employment decisions. It therefore reversed the district court's order dismissing those claims.

In Petruska's case, the retaliatory conduct at issue is the employment decision itself, which *Elvig* recognizes as a decision protected by the Free Exercise Clause. Because Petruska does not raise a sexual harassment or hostile work environment claim and because the retaliatory conduct she alleges constitutes a protected choice, we need not decide today whether the types of claims in *Elvig* would fall within the ministerial exception to Title VII.

[52] I agree with the majority insofar as it concludes that Petruska has failed to plead fraud with sufficient specificity under Federal Rule of Civil Procedure 9(b), and accordingly, concur in its judgment to affirm the dismissal of Count III.

[53] Civil conspiracy requires proof that two or more persons combined to do an unlawful act or to do an otherwise lawful act by unlawful means. *See, e.g., Thompson Coal Co. v. Pike Coal,* 412 A.2d 466, 472 (Pa. 1979).

[54] Under Pennsylvania law, an employer may be liable for negligent supervision "where the employer fails to exercise ordinary care to prevent an intentional harm to a third party which (1) is committed on the employer's premises by an employee acting outside the scope of his employment and (2) is reasonably foreseeable." *Mullen v. Topper's Salon & Health Spa, Inc.*, 99 F. Supp. 2d 553, 556 (E.D. Pa. 2000) (citations omitted). Although Petruska's First Amended Complaint is replete with references to the current priest sexual abuse scandals and

(Continued on following page)

turn on Petruska's ability to prove that Gannon's restructuring constituted an unlawful or tortious act. In this case, the alleged underlying unlawful act is the violation of Title VII. Because I would hold that Gannon's decision to restructure fell within the ministerial exception to Title VII, these claims should also be dismissed.

C.

Finally, Petruska asserts a state law breach of contract claim. Petruska alleges that pursuant to her contract with Gannon, she was entitled to serve on the President's Staff and lead the Chaplain's Division. She claims that by removing her from these positions, Gannon breached its promise.

On its face, application of state contract law does not involve government-imposed limits on Gannon's right to select its ministers: Unlike the duties under Title VII and state tort law, contractual obligations are entirely voluntary. As the court noted in *Minker v. Baltimore Annual Conference of United Methodist Church,* 894 F.2d 1354, 1360 (D.C. Cir. 1990), "[a] church is always free to burden its activities voluntarily through contract, and such contracts are fully enforceable in civil court." *See also, e.g., Rayburn,* 772 F.2d at 1171 ("Like any other organization, [churches] may be held liable . . . upon their valid contracts."). Enforcement of a promise, willingly made and supported by consideration, in no way constitutes a

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allegations that Bishop Trautman covered up harassment and abuse directed towards other individuals, the only intentional harm to which she claims she was personally subjected is the underlying discrimination and retaliation.

state-imposed limit upon a church's free exercise rights. Accordingly, application of state law to Petruska's contract claim would not violate the Free Exercise Clause.

Similarly, at least at the outset, resolution of Petruska's breach of contract claim would not excessively entangle the court in a religious matter. For purposes of evaluating Petruska's contract claim, we need not examine Gannon's decisions with respect to which individuals will perform particular spiritual functions; rather, we need only inquire as to whether Gannon promised Petruska that she would be entitled to perform those functions for a specified period of time. In that respect, the claim potentially can "be adduced by a fairly direct inquiry" into whether there was an offer, acceptance, consideration, and breach. *Minker*, 894 F.2d at 1360. If Gannon's response to Petruska's allegations raise issues which would result in excessive entanglement, the claims may subject to dismissal on summary judgment. *See id.* The allegations in Petruska's complaint, however, do not demand such a conclusion. I would therefore remand this claim for further consideration by the District Court.

III.

A church's choice regarding who will perform its spiritual functions is, by its very nature, a religious decision. By rejecting this basic premise, the majority effectively declines to adopt a ministerial exception, placing this Court at odds with every other federal court of appeals to consider the issue. Because, in my view, the majority's holding permits governmental interference with

a religious institution's constitutionally-protected choices in violation of the First Amendment, I respectfully dissent.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 05-1222

LYNETTE M. PETRUSKA,

Appellant

v.

GANNON UNIVERSITY; THE BOARD OF TRUSTEES OF GANNON UNIVERSITY; WILLIAM I. ALFORD, II; ROBERT H. ALLSHOUSE; JOSEPH F. ALLISON; MICHAEL P. ALLISON, REV.; JAMES A. BALDAUF; L. SCOTT BARNARD; GEORGE J. BEHRINGER; ARNOLD E. BERGQUIST; LAWRENCE E. BRANDT, REV. MSGR.; ROBERT L. BRUGGER, REV. MSGR.; DONALD M. CARLSON; DANIEL C. CARNEVAL, D.O.; STEPHANIE DOMITROVICH, HON. ; THOMAS L. DOOLIN; JAMES J. DURATZ; ANTOINE M. GARIBALDI; THOMAS C. GUELCHER; WILLIAM M. HILBERT, SR.; BRIAN J. JACKMAN; JAMES W. KEIM, JR.; MARY RITA KUHN, SR., SSJ; THOMAS J. LOFTUS; ANNE C. MCCALLION; JOSEPH T. MESSINA; MICHAEL J. NUTTALL; JOHN E. PAGANIE; DENISE ILLIG ROBISON; JAMES J. RUTKOWSKI, JR.; JAMES A. SCHAFFNER; HELEN M. SCHILLING, M.D., D.D.S.; JOHN M. SCHULTZ, VERY REV.; ROBERT J. SMITH, REV. MSGR.; LAWRENCE T. SPEICE, REV. MSGR.; WILLIAM C. SPRINGER; JAMES G. TOOHEY; DONALD W. TRAUTMAN, BISHOP; ANASTASIA VALIMONT, SR. SSJ; RICARDA VINCENT, SR. SSJ; MELVIN WITHERSPOON; ALL OTHER KNOWN AND UNKNOWN MEMBERS OF THE BOARD OF TRUSTEES OF GANNON UNIVERSITY DURING THE TENURE OF DONALD W. TRAUTMAN,
as members of the Board of Trustees of Gannon

University; DAVID RUBINO, MSGR., in their individual and official capacities; NICHOLAS ROUCH, REV., in their individual and official capacities

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On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Civ. Action No. 04-80)
District Judge: Honorable Sean J. McLaughlin

Argued October 20, 2005

BEFORE: SMITH, [1]BECKER, and NYGAARD, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued on October 20, 2005. On consideration thereof, it is now ORDERED and ADJUDGED that the judgment of the District Court entered on December 27, 2004, be and the same hereby is affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. The parties shall bear their own costs.

Attest:

/s/ Marcia M. Waldron
Clerk

DATED: May 24, 2006

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[1] The Honorable Edward R. Becker authored this opinion, but died before it was released.

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA**

LYNETTE M. PETRUSKA, Plaintiff v. GANNON UNIVERSITY, et al., Defendants.	)	Civil Action No. 04-80 Erie

MEMORANDUM OPINION

McLaughlin, J.

This case is brought by Plaintiff, Lynette M. Petruska, against Gannon University, its Board members, and certain of its current or former officials and arises out of disputes relating to her prior employment as Chaplain for the University. Petruska's First Amended Complaint asserts various state law claims as well as claims of retaliatory and gender-based employment discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) *et seq.* Defendants have moved to dismiss the First Amended Complaint in its entirety for lack of subject matter jurisdiction. Because we conclude that we are prohibited on First Amendment grounds from adjudicating Plaintiff's claims, the Defendants' motion will be granted.

I. STANDARD OF REVIEW

We note at the outset that Defendants' motions present a facial challenge to this Court's subject matter

jurisdiction. *See Gould Electronics, Inc. v. United States*, 220 F.3d 169, 176 (3d Cir. 2000) (a Rule 12(b)(1) motion may be treated as either a facial or factual challenge to the court's subject matter jurisdiction). In reviewing a facial attack, courts consider only the allegations of the complaint and documents referenced therein and attached thereto and must view them in the light most favorable to the plaintiff. *Id.* Thus, unlike a factual attack, which requires the court to "'weigh the evidence and satisfy itself as to the existence of its power to hear the case,'" a facial attack "offers the plaintiff the safeguard of requiring the court to consider the allegations of the complaint as true." *Deli*, 82 Fed. Appx. 773, No. 02-1361, 2003 WL 22998139 at *1 (Dec. 19, 2003) (quoting *Mortensen v. First Federal Sav. and Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977)).

Nevertheless, we also note that Plaintiff's various submissions in opposition to the motions to dismiss assert factual allegations and/or make reference to documents not included within her First Amended Complaint or appended thereto. To the extent Plaintiff makes reference to matters outside of the pleadings, we construe her position as an informal request to further amend her First Amended Complaint consistent with the factual allegations contained in her oppositional papers. In short, the Court has considered all of the Plaintiff's submissions, and we have credited Plaintiff's allegations for the purpose of testing whether there are genuine disputed issues in existence that would bear on this Court's subject matter jurisdiction.

Regardless whether Defendants' motion is construed as a facial attack or a factual attack, however, it is ultimately the Plaintiff's burden to establish this Court's jurisdiction. *See Pennsylvania Protection and Advocacy,*

Inc. v. Houston, 136 F. Supp. 2d 353, 359 (E.D. Pa. 2001) (citing *Turner v. Bank of North America*, 4 U.S. 8, 1 L.Ed. 718, 4 Dall. 8 (1799)). With this standard of review in mind, we set forth below the material allegations in Plaintiff's First Amended Complaint.[1]

II. BACKGROUND

Gannon University is a private, Catholic, diocesan college established under the laws of the Commonwealth of Pennsylvania and located in Erie, Pennsylvania. The University receives both federal and state funding to further its educational mission. (First Amended Complaint – hereinafter, "FAC" – at ¶ 2.)

Gannon's Board of Trustees is the University's governing body with "full and complete authority to conduct the affairs of the University." (FAC at ¶ 3.) Defendant Bishop Donald Trautman is the Bishop of the Roman Catholic Diocese of Erie and, pursuant to Gannon's by-laws, Chair of the Gannon Board of Trustees, having certain extraordinary powers reserved to him by the Board. (FAC ¶ 4.) Defendant Monsignor David Rubino served as president of Gannon University from 1991 until his resignation in May of 2000. (FAC ¶ 5.) Thereafter, he

[1] Although for present purposes we accept Plaintiff's factual averments as true, we need not credit bald assertions, unsupported conclusions, unwarranted inferences, or "legal conclusions masquerading as factual conclusions." *Pennsylvania Protection and Advocacy, Inc. v. Houston*, 136 F. Supp. 2d 353, 359 (E.D. Pa. 2001) (citing *Morse v. Lower Merion School Dist.*, 132 F.3d 902, 906 (3d Cir.1997); *Hunter v. United States*, No. 3:CV-00-0036, 2000 WL 1880257, *3 (M.D.Pa. Dec. 15, 2000)). *See also Danvers Motor Co., Inc. v. Ford Motor Co.*, 186 F. Supp. 2d 530, 538 (D.N.J. 2002).

was replaced by Defendant Antoine Garibaldi, Gannon's current president. (*Id.* at ¶ 6.) Defendant Reverend Nicholas Rouch is the part-time Vice President for Mission and Ministry at Gannon. (*Id.* at ¶ 7.)

Plaintiff was initially hired by Gannon as Director for the University's Center for Social Concerns and commenced her employment on July 16, 1997. (FAC ¶ 9.) In considering and accepting this position, Plaintiff relied upon Gannon's self-representation as an equal opportunity employer that does not discriminate on the basis of, among other things, gender. (*Id.*)

Shortly after Plaintiff was hired, Defendant Rouch – then Chaplain for the University – left his position to commence a three year period of study in Rome. (FAC ¶ 10.) Rouch received assurances from the Administration that he would return to his position as Chaplain once he concluded his studies. After Rouch's interim replacement resigned, another chaplain was needed to fill the vacancy. (*Id.*)

Effective July 1, 1999, Plaintiff was appointed Chaplain for the University. (FAC ¶ 11.) In accepting this appointment, Plaintiff sought, received, and relied upon assurances from Rubino "that she would not be used by the University only to be replaced when a male became available to fill the position, or specifically when Rouch returned from Rome." (FAC ¶ 12.) Rubino assured Plaintiff that Trautman had approved her appointment as permanent Chaplain and that her tenure would be based upon her performance, not her gender. (*Id.*) Similar representations were made on Plaintiff's behalf to the president of Plaintiff's religious order. (FAC ¶ 14.)

Rubino subsequently took a leave of absence as Gannon's President after allegations surfaced that he had had a sexual affair with a subordinate at the University. (FAC ¶ 15.) Shortly after Rubino's departure, another female employee at the University came forward with accusations that Rubino had sexually harassed her for a number of years. (FAC ¶ 16.) Plaintiff was instrumental in bringing this claim to the attention of Trautman and Dr. Thomas Ostrowski, then Provost of Gannon. (*Id.*)

Following Rubino's resignation in May of 2000, Gannon engaged in a campaign to cover-up Rubino's sexual misconduct at the insistence of Trautman. (FAC ¶ 17.) Plaintiff was vocal in opposing this and other of the Administration's policies and procedures which she viewed as discriminatory toward females. (FAC ¶ 64.) One such policy was Trautman's willingness to allow allegedly abusive clergy to remain on campus, including at least one former Gannon priest who had been removed because of sexual misconduct directed at students. (FAC ¶¶ 31, 64.) Plaintiff also strongly opposed the University's efforts, during the time that Rubino was coming under investigation for alleged sexual harassment of females, to limit the time frame within which victims of sexual harassment could file grievances. (FAC ¶ 65.) Moreover, as Chair of the University's Institutional Integrity Committee, Plaintiff was instrumental in submitting a Middle States accreditation report which raised issues of gender-based inequality in the pay of Gannon's female employees and which was critical of the University's policies and procedures for addressing complaints of sexual harassment and other forms of discrimination. Despite pressure from the University's administration, Plaintiff refused to change

those portions of the report which were critical of the University. (FAC ¶¶ 66-68.)

Plaintiff contends that, in retaliation for the foregoing conduct and because of her gender, she was discriminated against in the terms and conditions of her employment. In essence, Plaintiff avers that – while nominally retaining the title of University Chaplain – she was demoted in several respects, *to wit*:

* she was removed from her status as a member of the President's staff;

* her position as head of the Chaplain Division was unilaterally restructured at the behest and direction of Trautman such that she was placed under Rouch's supervision when the latter was appointed to the newly created Vice President for Mission and Ministry;

* many of the responsibilities and important decisions traditionally made by the University Chaplain – including those involving liturgical planning and/or impacting the University's Catholic identity – were taken from Plaintiff and were reassigned either to Garibaldi or Rouch; and

* in a meeting with Garibaldi on April 18, 2002 Plaintiff was instructed to limit her comments when she was invited to speak at University events as Chaplain.

Trautman's decision to appoint Rouch as Vice President for Mission and Ministry, with supervisory power over Plaintiff, was contrary to both the University's bylaws, which vested power to create new academic or non-academic positions with the President of the University (not the Chair

of the Board), and the University's policy at the time of reducing the number of top level administration positions. (FAC ¶ 20.) Moreover, Trautman created this position without any input from the University or its administration and without any determination by the University's then-interim President, Dr. Ostrowski, that there was a need for the position. (*Id.*) In fact, Plaintiff alleges that Dr. Ostrowski repeatedly broached with her the possibility of Plaintiff accepting another position within the University, stressing that Trautman and Rouch would never let her remain Chaplain because of her gender. (FAC ¶¶ 21, 24.)

Upon beginning his term as University President, Defendant Garibaldi effectuated the plan of restructuring Plaintiff's employment so as to remove her from the President's staff and place the Chaplain's Division under the supervision of Rouch. (FAC ¶¶ 27-29, 36-37.) Contrary to the mandates of the University's Governance Manual, this "restructuring" was carried out without first being presented to the President's Council for consultation and approval. (FAC ¶ 37.)

Rouch subsequently contacted Plaintiff for the purpose of discussing the restructuring. Plaintiff declined meeting with Rouch on the ground that she first wanted to meet with Garibaldi to address her concerns about the perceived gender discrimination. (FAC ¶¶ 40-46.) Garibaldi declined Plaintiff's invitation for a meeting and advised her that if she did not report to Rouch, the University would take "appropriate action," which Plaintiff understood to mean the termination of her employment. (FAC ¶ 47.)

Believing that she was about to be fired, Plaintiff served Gannon with two weeks notice of her resignation

on October 14, 2002. (FAC ¶ 48.) Plaintiff was advised the following day that her resignation was accepted effective immediately and that she was to pack her belongings and leave the campus. Her access to the campus and to students was strictly limited thereafter. (FAC ¶ 49.) Following Plaintiff's departure, Rouch stated on several occasions to both students and staff that a female would not be considered to replace Plaintiff as Chaplain. (FAC ¶ 53.)

After exhausting her administrative remedies with the EEOC, Plaintiff commenced this action. Her First Amended Complaint asserts six distinct theories of recovery. Count One asserts a claim of gender discrimination under Title VII against all Defendants. Count Two asserts a Title VII claim for retaliatory discrimination against all Defendants. Count Three asserts claims against Gannon, Rubino and Trautman for fraudulent misrepresentations relative to her hiring and appointment as University Chaplain. Count Four asserts claims of civil conspiracy against Trautman, Garibaldi and Rouch relative to their alleged Title VII violations. Count Five alleges claims against Gannon and Garibaldi for breach of contract. Count Six alleges claims against Gannon and its Board for negligent supervision and retention of Trautman as Chair of the Board, Garibaldi as President, and Rouch as Part-time Vice President of the University.

Defendants have moved to dismiss all claims on the ground that they are barred by the so-called "ministerial exception," which is frequently applied in employment discrimination cases involving religious institutions. The issues have been briefed, argued, and are ripe for disposition.

III. DISCUSSION

The ministerial exception is rooted in the First Amendment which provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . " U.S. CONST. AMEND. I. It is axiomatic that these proscriptions on government authority extend to the judicial branch as well as the legislative branch. *See Kreshik v. Saint Nicholas Cathedral of the Russian Orthodox Church of North America*, 363 U.S. 190, 191 (1960).

Among the prerogatives protected by the Free Exercise Clause is the right of religious institutions to manage their internal affairs. *See Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church in North America*, 344 U.S. 94, 116 (1952) (Free Exercise Clause protects the power of religious organizations "to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine."). The Supreme Court has been particularly deferential in matters involving the church's selection of its own clergy. *See, e.g., Gonzales v. Roman Catholic Archbishop of Manila*, 280 U.S. 1, 16 (1929) ("it is the function of the church authorities to determine what the essential qualifications of a chaplain are and whether the candidate possesses them"); *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 717 (1976) ("questions of church discipline and the composition of church hierarch [sic] are at the core of ecclesiastical concern.").

The Establishment Clause prohibits laws "respecting an establishment of religion." U.S. CONST. AMEND I. In *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971), the Supreme Court held that a statute comports with the

Establishment Clause if it has a secular legislative purpose, if its principal or primary effect neither advances nor inhibits religion, and if it does not foster an "excessive government entanglement with religion." Unconstitutional entanglement with religion may arise in situations "where a 'protracted legal process pit(s) church and state as adversaries,' . . . and where the Government is placed in a position of choosing among 'competing religious visions.'" *EEOC v. Catholic University of America*, 83 F.3d 455, 465 (D.C. Cir. 1996) (internal and end citations omitted).

Consistent with these principles, a number of circuit courts of appeals have held that the First Amendment precludes courts from adjudicating employment discrimination suits between church and minister. Among the first decisions involving Title VII was *McClure v. The Salvation Army*, 460 F.2d 553 (5th Cir. 1972), a case in which the plaintiff, Billie B. McClure, an ordained minister in the Church of the Salvation Army, sued the Church under Title VII, alleging that she had received less salary and fewer benefits than similarly situated male officers and that she had been discharged because of her complaints relative to these practices. The Fifth Circuit Court of Appeals was confronted with the issue whether application of Title VII in McClure's case would violate First Amendment principles. Quoting from *Sherbert v. Verner*, 374 U.S. 398 (1963) and *West Virginia State Bd. of Education v. Barnette*, 319 U.S. 624 (1943), the court observed that it is only in the rarest of occasions – e.g., where there is a need to prevent the "gravest abuses, endangering paramount [state] interests" – that government-imposed limitations on the free exercise of religion can be upheld. 460 F.2d at 558. Regarding matters of employment, the court noted that:

> [t]he relationship between an organized church and its ministers is its lifeblood. The minister is the chief instrument by which the church seeks to fulfill its purpose. Matters touching this relationship must necessarily be recognized as of prime ecclesiastical concern. Just as the initial function of selecting a minister is a matter of church administration and government, so are the functions which accompany such a selection.

460 F.2d at 558-59. The Church's practices relative to its ministers' assignments, salaries, and duties, the court concluded, were "matters of church administration and government and thus, purely and ecclesiastical cognizance." *Id.* at 560. The court found that application of Title VII to McClure's case would necessarily involve an investigation and review of these practices which, in turn, would result in state interference in matters of church administration and government – "matters of a singular ecclesiastical concern" – and threaten the separation of church and state contemplated by the Establishment Clause. *Id.* Despite these concerns, the court determined it need not rule on this constitutional issue because, it held, Congress did not intend the statute to regulate the employment relationship between church and minister. *Id.* at 560-61.

Several other circuit courts of appeals have since applied this exception to cases involving employment disputes between church and minister. *See, e.g., Werft v. Desert Southwest Annual Conference of the United Methodist Church*, 377 F.3d 1099, 1104 (9th Cir. 2004) (minister's claims under Title VII, the Rehabilitation Act of 1978, the Americans with Disabilities Act of 1990, and the Arizona Civil Rights Act, all of which were grounded in the church's alleged failure to accommodate minister's

disabilities, were part of the employment relationship between church and minister and were therefore properly dismissed under the ministerial exception); *Alicea-Hernandez v. Catholic Bishop of Chicago*, 320 F.3d 698, 703-04 (7th Cir. 2003) (court lacked subject matter jurisdiction to address Title VII gender discrimination claims raised by plaintiff with ministerial duties); *Gellington v. Christian Methodist Episcopal Church, Inc.*, 203 F.3d 1299, 1304 (11th Cir. 2000) (minister's Title VII claims that he was retaliated against and constructively discharged as a result of assisting a female minister in her sexual harassment complaint was barred by Free Exercise Clause and Establishment Clause); *Catholic University of America*, 83 F.3d at 461 (First Amendment precluded judicial review of nun's Title VII gender discrimination and retaliation claims which were premised on the denial of her application for tenure in religious university's Department of Canon Law); *Lewis v. Seventh Day Adventists Lake Region Conference*, 978 F.2d 940, 942 (6th Cir. 1992) (affirming dismissal of minister's breach of contract and promissory estoppel claims on First Amendment grounds); *Scharon v. St. Luke's Episcopal Presbyterian Hosp.*, 929 F.2d 360, 363 (8th Cir. 1991) (court's adjudication of hospital chaplain's Title VII and age discrimination claims was barred by First Amendment); *Natal v. Christian and Missionary Alliance*, 878 F.2d 1575, 1577 (1st Cir. 1989) (affirming dismissal of clergyman's wrongful termination claim based upon Free Exercise clause); *Rayburn v. General Conf. of Seventh-Day Adventists*, 772 F.2d 1164 (4th Cir. 1985) (plaintiff's Title VII challenge to denial of pastoral appointment was barred by religion clauses of First Amendment).

The ministerial exception "does not apply solely to the hiring and firing of ministers, but also relates to the broader relationship between an organized religious institution and its clergy." *Werft*, 377 F.3d at 1103. In fact, *any matters* "touching this relationship" are necessarily considered "as of prime ecclesiastical concern." *McClure*, 460 F.2d at 559. Issues such as a minister's salary, place of assignment, and the duty he is to perform in furtherance of the religious mission of the church are all matters "touching" the church-minister relationship. *Id.*

While the Third Circuit Court of Appeals has not formally adopted the ministerial exception in an employment discrimination case, we predict that it would apply the exception in appropriate circumstances. In *Little v. Wuerl*, 929 F.2d 944 (3d Cir. 1992), the Third Circuit observed that the right to freely exercise one's religion is "guaranteed not only to individuals but also to churches in their collective capacities, which must have 'power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.'" 929 F.2d at 947 (citing *Rayburn*, *supra*, at 1167). Continuing, the court recognized that other federal courts "[r]elying on this basic principle . . . have consistently found that Title VII does not apply to the relationship between ministers and the religious organizations that employ them, even where discrimination is alleged on the basis of race or sex." *Id.* (citing *McClure*, *supra* and *Rayburn*, *supra*).

Little did not involve application of the ministerial exception; rather, it involved the generally recognized right of religious institutions to discriminate on the basis of religion against both ministerial and non-ministerial employees alike. In *Little*, a non-Catholic teacher formerly

employed at a Catholic school claimed that the school engaged in religious discrimination against her in violation of Title VII when, as a result of her remarriage, it failed to renew her contract. In addressing the viability of Little's claim, the court applied the teachings of *N.L.R.B. v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), and framed the following inquiries: (1) whether applying Title VII to the Parish's decision in Little's case would raise substantial constitutional questions and, if it would, (2) whether Congress clearly expressed an intent that Title VII be applied to this kind of decision. 929 F.2d at 947. The court answered the first inquiry affirmatively, finding that application of Title VII's prohibition of religions [sic] discrimination to Little's case would raise "serious constitutional questions" under both the Free Exercise and Establishment Clauses. *Id.* at 949. However, the court addressed the second inquiry in the negative, concluding that there was no indication Congress affirmatively intended Title VII to apply to situations, like that of Little, in which "a parochial school [discharges] a Catholic or non-Catholic teacher who has publicly engaged in conduct regarded by the school as inconsistent with its religious principles." *Id.* at 951. The *Little* Court thus held that Little's claims lacked viability under Title VII, but not for reasons involving the ministerial exception.

In *Geary v. Visitation of the Blessed Virgin Mary Parish School*, 7 F.3d 324 (3d Cir. 1993), the Third Circuit addressed a lay teacher's claim that she was dismissed by a church-operated elementary school on the basis of her age, in violation of the Age Discrimination in Employment Act, and that her health benefits were canceled in retaliation for having filed the ADEA suit. Like the court in *Little*, the *Geary* Court employed the inquiry set forth in

Catholic Bishop. However, the *Geary* Court concluded its analysis at the first prong, determining that application of the ADEA in Geary's case would not present a significant risk of infringing First Amendment rights. Given the limited scope of inquiry involved in Geary's ADEA claim and the fact that the school had proffered no religious doctrine in support of her termination and loss of health benefits, the court concluded that application of the ADEA to the lay faculty of a religious school would not present a significant risk of entanglement. The court explained that "when the pretext inquiry neither traverses questions of the validity of religious beliefs nor forces a court to choose between parties' competing religious visions, that inquiry does not present a significant risk of entanglement." *Id.* at 330. The Court contrasted situations where "the employee who challenges an employment decision is a member of the clergy," noting that "some courts have refused to allow even this limited inquiry into pretext." *Id.* (citing *Scharon v. St. Luke's Episcopal Presbyterian Hosp.*, *supra*). However, the court concluded that the ministerial exception was inapplicable to Geary:

> notwithstanding Geary's apparent general employment obligation to be a visible witness to the Catholic Church's philosophy and principles, a court could adjudicate Geary's claims without the entanglement that would follow were employment of clergy or religious leaders involved. *Compare Demarco* [*v. Holy Cross High School*], 4 F.3d [166, 172 (2d Cir. 1993)] (distinguishing case in which employer/employee relation is so pervasively religious that no pretext inquiry can be made without offending First Amendment, and case in which references to employee's religious

> inadequacy are limited to very specific, testable allegations).

7 F.3d at 331.

We read *Little* and *Geary* as at least tacit acknowledgment by our Circuit Court of Appeals that it would apply the ministerial exception in appropriate circumstances. This, of course, begs the question whether the instant case presents "appropriate circumstances."

Plaintiff maintains that the exception is inapplicable to her case because, she insists, she is not a "minister." Plaintiff points out that, under Roman Catholic Canonical law, only ordained priests can be chaplains or ministers, and only males can be ordained priests. According to Petruska, "[i]t is somewhat hypocritical of the church affiliated defendants to argue that Petruska is a minister and a chaplain, when their church hierarchy would claim that she is neither." (Pl.'s Amended Br. in Opp. to Def.s' Mot. to Dismiss [Doc. No. 58] at p. 11). Be that as it may, the question whether an individual is a "minister" for purposes of the ministerial exception is a matter determined by federal common law, not ecclesiastical law, and federal courts have endorsed a functional approach to this inquiry. *See Aliciea-Hernandez*, 320 F.3d at 703-04 ("In determining whether an employee is considered a minister for the purposes of applying this exception, we do not look to ordination but instead to the function of the position"; plaintiff's duties as press secretary for Archdiocese of Chicago were ministerial in nature where plaintiff was integral in shaping the message that the Church presented to the Hispanic community); *Catholic University of America*, 83 F.3d at 457 ("The ministerial exception

encompasses all employees of a religious institution, whether ordained or not, whose primary functions serve its spiritual and pastoral mission.") (nun's role as professor within Catholic University's Department of Canon Law was the functional equivalent of a minister despite the fact that she was not ordained by the Catholic Church); *Rayburn*, 772 F.2d at 1169 (ministerial exception applies to lay employees of religious institutions whose "primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship"; if their positions are "important to the spiritual and pastoral mission of the church" they should be considered "clergy") (internal quotation marks and citations omitted); *EEOC v. Southwestern Baptist Theological Seminary*, 651 F.2d 277, 283 (5th Cir. 1981) (non-ordained faculty at Baptist seminary would be considered "ministers" where no course has a "strictly secular purpose").

Plaintiff's allegations establish that she was appointed to the position of University Chaplain on July 1, 1999. (FAC ¶ 1). While Plaintiff, as Chaplain, initially served as head of the Chaplain's Division, she was subsequently placed under the supervision of the Vice President for Mission and Ministry, headed by Defendant Rouch. (*Id.* at ¶¶ 1, 20, 37.) Her employment responsibilities included serving as co-chair of Gannon's Catholic Identity Task Force, thereby giving her input into "issue[s] impacting the Catholic identity of the University," until Garibaldi allegedly undermined her involvement in these issues. (*See id.* at ¶ 28) Plaintiff also held prayer services as Chaplain and was traditionally involved in the planning of liturgies. (FAC ¶ 29, 36.) Petruska's June 2002 performance evaluation, which is appended to her First Amended

Complaint, indicates that "[t]he office of the Chaplin [sic] has primarily worked with students and the Catholic Identity Task Force in student development and mission-focused activities." (FAC [Doc. No. 49] at Ex. 1, p. 2.) Other comments indicate that the "major events" of the Chaplain's Office include liturgies and service trips, among other things. (*Id.*) Her "performance objectives" for the next review period were as follows:

> 1. More regular meetings w[ith] [the University] President to keep him abreast of issue [sic] and concerns [and] to discuss issues more thoroughly before presentation to [the] broader constituency[;]
>
> 2. Continue to develop strategies to increase participation in [the] sacramental life of [the] Gannon community[;]
>
> 3. Increase involvement of [the] Catholic Identity Task Force in promoting [the] Catholic Identity of [the] University [and] discussion of Gannon's mission[;]
>
> 4. Continue to develop faculty [and] staff as partners in . . . [the] sacramental/spiritual mission of [the] University[.]

(*Id.* at p. 3.)[2]

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[2] We also note, by way of further example, the advertisement which Gannon placed in the National Catholic Reporter in May of 2001 to solicit applicants for the position of Director of Catholic Campus Ministry. (*See* Ex. 1-A to Pl.'s Third Motion to Submit and consider Documents in Supp. of Pl's Amended Br. in Opp. to All Def.s' Motions to Dismiss [Doc. No. 63].) It appears to be undisputed that the Office of Campus Ministry was an office within the Chaplain's Division during Plaintiff's tenure such that Plaintiff would have had ultimate

(Continued on following page)

While Petruska downplays the ministerial nature of her prior job responsibilities and cites her involvement in various secular job-related activities, it is evident from her own allegations that, as University Chaplain, she was instrumental in implementing Gannon's Catholic mission and actively involved in communicating that message to a broad lay constituency. Her own allegations and submissions suggest that her primary duties included, *inter alia*, "spreading the [Catholic] faith" and "supervisi[ng] or participati[ng] in religious ritual and worship." *See Rayburn*, 772 F.2d at 1169. Given the importance of Petruska's role *vis-a-vis* the spiritual and pastoral mission of the University, *see Catholic University of America*, 83 F.3d at 457 and *Rayburn*, 772 F.2d at 1169, she must be considered a "ministerial" employee.

Nor is it significant that Gannon has not asserted a religious basis for the challenged employment actions, for "[t]he focus under the ministerial exception is on the action taken [by the employer], not possible motives." *Catholic University of America*, 83 F.3d at 465. Indeed, "[t]he exception precludes any inquiry whatsoever into the reasons behind a church's ministerial employment decision." *EEOC v. Roman Catholic Diocese of Raleigh, N.C.*, 213 F.3d 795, 802 (4th Cir. 2000). "The church need not, for example, proffer any religious justification for its decision, for the Free Exercise Clause 'protects the act of a decision rather than a motivation behind it.'" *Id.* (quoting

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supervisory authority over the Campus Ministry Director. The advertisement notes that the Director of Catholic Campus Ministry is responsible for "designing, developing and coordinating religious services, programs and pastoral counseling that pertains to advancing the faith life, spiritual welfare and apostolic formation of the Gannon community." (*Id.*)

Rayburn, *supra*, 772 F.2d 1164, 1169 (4th Cir. 1985)). *See also Werft*, 377 F.3d at 1103 ("it is the decision itself which is exempt – the courts may not even look into the reasoning"); *Alicea-Hernandez*, 320 F.3d at 703 ("It is . . . not our role to determine whether the Church had a secular or religious reasons for the alleged mistreatment of Alicea-Herenandez. The only question is that of the appropriate characterization of her position."); *Bollard v. California Province of the Society of Jesus*, 196 F.3d 940, 946 (9th Cir. 1999) ("[T]he ministerial relationship lies so close to the heart of the church that it would offend the Free Exercise Clause simply to require the church to articulate a religious justification for its personnel decision."); *Rayburn*, 772 F.2d at 1169 ("In these sensitive areas, the state may no more require a minimum basis in doctrinal reasoning than it may supervise doctrinal content."); *Patsakis v. Greek Orthodox Archdiocese of America*, 339 F.Supp.2d 689, 697 n. 1 (W.D. Pa. 2004) ("[T]o delve into the reasons for Patsakis' termination before deciding whether she is a "minister" would enmesh the court in the very investigation and review of church matters that the ministerial exception was designed to prevent."). In sum, Petruska's observation that Gannon has not posited a religious motivation for the challenged employment action is of no legal moment.

Petruska also suggests that the ministerial challenge does not survive the Supreme Court's decision in *Employment Division, Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990). In *Smith*, the Supreme Court held that the Free Exercise Clause did not require the State of Oregon to permit an exception, based on the religious use of peyote, from the general criminal prohibition on the use of the drug. In so holding, the Court

explained that "the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes . . . conduct that his religion prescribes . . . " *Id.* at 879.

However, numerous federal courts of appeals have rejected the argument that *Smith* somehow undermines the ministerial exception. *See Roman Catholic Diocese*, 213 F.3d at 800 n.*; *Gellington*, 203 F.3d at 1303; *Combs v. Central Texas Annual Conf. of United Methodist Church*, 173 F.3d 343, 350 (5th Cir. 1999); *Catholic University of America*, 83 F.3d at 462-63. *Accord Bryce v. Episcopal Church in the Diocese of Colorado*, 289 F.3d 648, 656 (10th Cir. 2002) (applying the rationale of these cases and finding that the church autonomy doctrine similarly remains viable after *Smith*). As the Eleventh Circuit Court of Appeals has succinctly explained:

> The *Smith* decision focused on the first type of government infringement on the right of free exercise of religion – infringement on an individual's ability to observe the practices of his or her religion. The second type of government infringement – interference with a church's ability to select and manage its own clergy – was not at issue in *Smith*. The Court's concern in *Smith* was that if an individual's legal obligations were contingent upon religious beliefs, those beliefs would allow each individual "'to become a law unto himself.'" . . . The ministerial exception does not subvert this concern; it was not developed to provide protection to individuals who wish to observe a religious practice that contravenes a generally applicable law. Rather, the exception only continues a long-standing tradition that churches are to be free from government

> interference in matters of church governance and administration. . . . Also, because the ministerial exception is based on this tradition and not on strict scrutiny, the Court's rejection in *Smith* of the compelling interest test does not affect the continuing vitality of the ministerial exception.

Gellington, 203 F.3d at 1303-04. We find the foregoing authority persuasive and therefore hold that *Smith* does not undermine the viability of the ministerial exception.

Petruska also asserts several theories as to why this Court should consider the "ministerial exception" waived for present purposes. She contends, for example, that the Defendants have waived the exception by failing to expressly raise it during EEOC proceedings.

However, several courts have ruled that a defendant's failure to invoke a defense during EEOC proceedings does not necessarily waive the defense for purposes of district court proceedings. *See, e.g., McGinty v. New York*, 251 F.3d 84, 93-94 (2d Cir. 2001) (failure of state defendants to raise Eleventh Amendment immunity as a defense in EEOC proceedings did not constitute a "waiver of immunity" in a subsequent federal court action under the ADEA); *Brennan v. King*, 139 F.3d 258, 263 (1st Cir. 1998) (failure of university to invoke professor's refusal to arbitrate discrimination claims within university's internal appeals process as defense to plaintiff's charges before the EEOC did not constitute a waiver of the defense in district court proceedings); *Cook v. Union Camp Corp.*, No. CIV. A.1:95CV140-S-D, 1996 WL 407549 at *3 (N.D. Miss. April 4, 1996) (defendant's failure to have raised the 180-day limitation defense before the EEOC did not waive its right to assert the defense in federal court); *Byrnes v. Herion Inc.*, 757 F.Supp. 648, 653 (W.D.PA. 1990) (failure

to raise limitations defense at EEOC level did not constitute waiver in federal court action). Although courts charged with reviewing determinations of another tribunal will not ordinarily consider issues not raised in the earlier proceedings, "that truism is without application here since it [is] no part of the responsibility of the district court to review the determinations of the EEOC." *Brennan*, 139 F.3d at 263. Accordingly, we are not persuaded that Defendants' failure to argue the ministerial exception before the EEOC waives the defense for present purposes.

Alternatively, Petruska contends that the ministerial exception has been waived by Gannon's representations that it is an equal opportunity employer and that it does not discriminate against students on the basis of (among other things) gender – representations which, according to Plaintiff, Gannon makes in order to remain eligible for public funding. A similar argument was raised and rejected by the court in *EEOC v. Southwest Baptist Theological Seminary*, 485 F.Supp. 255 (N.D. Texas 1980), *aff'd in part and rev'd in non-relevant part*, 651 F.2d 277 (5th Cir. 1981). That case involved a suit by the EEOC to establish jurisdiction over the defendant seminary and to compel certain reporting requirements under Title VII of the Civil Rights Act. The seminary had refused to submit to the reporting requirements on the grounds that, because of the allegedly "ministerial" status of its faculty and administrators, it was protected from Title VII enforcement by the religious clauses of the First Amendment. The EEOC argued that any free exercise objections that the seminary might have relative to the enforcement of Title VII had been waived by the seminary's conduct in seeking and maintaining its status as an approved program of education for veterans receiving educational benefits, and

thereby subjecting itself to enforcement of similar prohibitions contained in Title VI. The district court disagreed and observed that coverage under Title VI of the Act is independent of coverage under Title VII. As the court noted, "Title VI forbids only discrimination by a recipient of federal funds against the participants in (or beneficiaries of) a federally assisted program conducted by the recipient, regardless of whether or not the participant or beneficiary is an employee." 485 F.Supp. at 261 (citing 42 U.S.C. § 2000d). Thus, "[i]f Title VII also applies, it will do so by its own terms and not by virtue of the employer's status as a recipient of federal funds under Title VI." *Id.* at 262. Noting that "[w]aivers of important constitutional rights must generally be knowing and intelligent and consents to their violation must be strictly construed," and unable to find any lack of good faith in the seminary's assertion of religious objections to the enforcement of Title VII, the district court "decline[d] to hold that acceptance of veterans receiving federal assistance constitutes a waiver of religious objections to the more comprehensive and intrusive enforcement possible under Title VII." *Id.* at 262-63.[3]

Plaintiff refers us to the case of *Erie Telecommunications, Inc. v. City of Erie*, 853 F.2d 1084 (3d Cir. 1988),

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[3] On appeal, the Fifth Circuit affirmed the district court in part and reversed and remanded in non-relevant part. The Court of Appeals held that enforcement of Title VII was precluded with respect to the employment relationship between the seminary and its faculty; however, it found no First Amendment proscription against enforcement of Title VII relative to the seminary's non-ministerial administrative staff and support personnel. *See EEOC v. Southwestern Baptist Theological Seminary*, 651 F.2d 277 (5th Cir. 1981). The district court's ruling concerning the seminary's lack of waiver of any First Amendment protection was apparently not challenged on appeal, as it was not addressed in the Fifth Circuit's opinion.

among others, in support of the proposition that First Amendment rights can be waived. In *Erie Telecommunications*, the plaintiff, a cable operator, challenged certain franchise and access agreements into which it had entered with the City of Erie on the ground that the agreements violated the plaintiff's first amendment right of free expression. The Third Circuit held that the plaintiff's claims were barred by virtue of a release which the plaintiff had signed in the settlement of prior litigation brought by one of its competitors. The release contained language acknowledging that the challenged franchise agreement was "valid, binding and of full force and effect," and it released the City of Erie from "any and all claims . . . relating to . . . the Franchise." *See* 853 F.2d at 1086. The court found that this language barred the plaintiff's "free expression" claims: " . . . ETI, by executing a broad and general release in January 1984, knowingly, voluntarily, and intelligently relinquished any constitutional causes of action which it must have known could be asserted against the City." 853 F.2d at 1101. As is readily apparent, *Erie Telecommunications* did not address the circumstances, if any, under which a religious institution may waive application of the ministerial exception and its holding is therefore of limited assistance here.[4]

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[4] Plaintiff's other cited cases are similarly inapposite. *See, e.g., Ferrill v. The Parker Group, Inc.*, 168 F.3d 468 (in suit brought under 42 U.S.C. § 1981 by African-American employee of telephone marketing firm, defendant waived its argument that its race-based assignment of "get out the vote" calls was protected political speech under the First Amendment by failing to assert it before the district court); *United States v. Berke*, 170 F.3d 882 (9th Cir. 1999) (defendant who entered into consent agreement as part of a plea agreement in criminal case involving violations of federal obscenity laws knowingly and voluntarily waived his First Amendment rights relative to prohibitions on his

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Contextually more relevant is Plaintiff's citation to *Welter v. Seton Hall University*, 608 A.2d 206 (N.J. 1992), a case in which two nuns who had been discharged from their teaching positions in Seton Hall's computer science department brought successful claims for breach of contract after the University failed to give them terminal-year contracts. In upholding the plaintiffs' verdict, the New Jersey Supreme Court held that the nuns were not ministerial employees and that, because the dispute implicated neither doctrinal issues nor issues of church policy, the trial court properly exercised jurisdiction over the claims. The court acknowledged the jurisdictional limitation which arises in employment cases involving "ministerial" employees, noting that the limitation is premised on the "sound proposition that to interfere with a religious employer's choices regarding who may propagate the faith or who may train others to do so is to entangle the judiciary impermissibly in matters of polity." 608 A.2d at 214. The court "hasten[ed] to add," however, "that religious institutions are free to bargain away the right to unimpeded discretion in deciding which persons are most qualified to minister the religion or to train those who will eventually minister the faith." *Id.* at 214. The court explained that "[a] cursory judicial review of the employment manual or contract to determine

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involvement in the production, sale, or distribution of otherwise non-obscene materials); *Jackson/Charvel, Inc. v. Gibson Guitar Corp.*, 863 F.2d 48 (6th Cir. 1988) (Table Case published at 1988 WL 123494) (consent decree operated to waive defendant's due process right to litigate certain issues); *Wilkicki v. Brady*, 882 F.Supp. 1227 (D.R.I. 1995) (plaintiff, in entering settlement agreement to withdraw charges made to town council, knowingly, voluntarily and intelligently waived his First Amendment rights).

whether the ministerially-functioning employee and the religious institution expressly included such a waiver will not transgress the First Amendment." *Id.* Seizing upon this language, Petruska contends that "the tribunals agreed upon by [the Defendants and herself] were the EEOC and now this court when Gannon represented itself as an equal opportunity employer and Plaintiff accepted employment based upon such representations." (Pl.'s Mem. of Law in Supp. of the Position Taken and Supported in Pl.'s Third Mot. to Submit and Consider Documents [Doc. No. 67] at p. 6.)

Whether, and to what extent, a religious institution can waive application of the ministerial exception is a point unrefined by existing case law. Defendants refer us to *Hall v. Baptist Mem. Health Care Corp.*, 215 F.3d 618 (6th Cir. 2000), *Little v. Wuerl*, *supra*, and *Siegel v. Truett-McConnell College, Inc.*, 13 F.Supp. 2d 1335 (N.D. Ga. 1994), *aff'd*, 73 F.3d 1108 (11th Cir. 1995) (TABLE, NO. 94-9376), for the proposition that, as a matter of law, a religious institution such as Gannon cannot waive the protections of the ministerial exception. However, those cases all involved situations in which a religious institution had engaged in religious discrimination against an employee – a privilege which is the subject of an express statutory exemption within Title VII. *See Hall*, 215 F.3d at 624 ("The decision to employ individuals 'of a particular religion' under § 2000e-1(a) and §2000e-2(e)(2) has been interpreted to include the decision to terminate an employee whose conduct or religious beliefs are inconsistent with those of its employer.") (citing *Little v. Wuerl*, *supra*, at 951 and *Killinger v. Samford Univ.*, 113 F.3d 196, 198 (11th Cir. 1997)). As the Sixth Circuit Court of Appeals explained in *Hall*:

> . . . the statutory exemptions from religious discrimination claims under Title VII cannot be waived by either party. *Little*, 929 F.2d at 951; *Siegel*, 13 F. Supp. 2d at 1345. The exemptions reflect a decision by Congress that religious organizations have a constitutional right to be free from government intervention. *Id.* "Once Congress stated that '[t]his title shall not apply' to religiously-motivated employment decisions by religious organizations," neither party could expand the statute's scope. *Siegel*, 13 F. Supp. 2d at 1345 (quoting *Little*, 929 F.2d at 951).

215 F.3d at 625.

Like Plaintiff, we question the applicability of this logic in the case at bar. Unlike Title VII's exemption for religious institutions engaging in religious discrimination, the ministerial exception is not a doctrine borne of any express statutory exemption. Instead, it is a judicially created doctrine which arises from well-recognized First Amendment principles and which exists quite independent of Title VII or any other statute. *See, e.g., Shaliehsabou v. Hebrew Home of Greater Washington, Inc.*, 363 F.3d 299, 306 (4th Cir. 2004) (ministerial exception applied in Title VII cases is based on constitutional principles and not on congressional debate or administrative guidelines), *reh'g en banc denied*, 369 F.3d 797 (4th Cir. 2004). Therefore, we are not persuaded that *Hall, Little*, and *Siegel* dispose of Plaintiff's waiver argument.

On the other hand, we note that the ministerial exception partakes of jurisdictional qualities, as it implicates constitutionally mandated restraints on this Court's power to adjudicate certain types of employment disputes. *See Roman Catholic Diocese of Raleigh, North Carolina*,

213 F.3d at 800 (the ministerial exception is a "constitutionally compelled limitation on civil authority [and] ensures that no branch of secular government trespasses on the most spiritually intimate grounds of a religious community's existence"). *See also Patsakis*, 339 F. Supp. 2d at 692-93 ("The propriety of asserting the 'ministerial exception' defense through a 12(b)(1) motion, as defendants have done here, is well-established.") (citing cases). Generally, issues bearing on a district court's subject matter jurisdiction are not capable of being waived. *See Kontrick v. Ryan*, 540 U.S. 443, 124 (2004) (subject matter jurisdiction may be raised initially by either party, or sua sponte by the court, at any stage of litigation, including appeal). Viewed in this light, the viability of Plaintiff's waiver argument seems more dubious.

Assuming only for the sake of argument that the doctrine of waiver is applicable in the ministerial exception context, we find that there is no factual basis in the record to warrant its application here. Waivers of constitutional rights must be voluntary, knowing, and intelligent, must be established by "clear" and "compelling" evidence, and must be strictly construed. *Erie Telecommunications, Inc.*, 853 F.2d at 1094-95 (citations omitted) (waiver involves the "intentional relinquishment of a known right or privilege," and the Supreme Court has admonished lower courts to "'indulge in every reasonable presumption against waiver'" and "'[not] presume acquiescence in the loss' of such rights.") (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). Even accepting as true all of the averments proffered by Plaintiff in her Amended Complaint and submissions to the Court in opposition to the instant motions, we find nothing that would give rise to a genuine issue of waiver in this case. In our view, as a matter of

law, Gannon's pronouncements on various occasions that it would voluntarily conform to the principle of nondiscrimination does not amount to a clear and unambiguous waiver of Gannon's right to assert in this litigation a First Amendment challenge to this Court's subject matter jurisdiction.

Having concluded that Petruska performed a "ministerial" function during her tenure at Gannon, and having also concluded that the Defendants have not waived the right to assert the "ministerial exception" doctrine in this litigation, we must further conclude that the exception precludes us from exercising jurisdiction over the claims in Plaintiff's First Amended Complaint. A determination of "whose voice speaks for the church is *per se* a religious matter." *Minker v. Baltimore Annual Conference of the United Methodist Church*, 894 F.2d 1354, 1356 (D.C. Cir. 1990). Thus, our resolution of any claims "touching" on the church-minister relationship – i.e., assignment of duties, pay, termination, etc. – are necessarily matters of "prime ecclesiastical concern" into which we may not delve. *McClure*, 460 F.2d at 558-59. Plaintiffs' complaints that, because of her gender and because of Gannon's desire to retaliate against her, she was effectively demoted, deprived of various ministerial responsibilities, and ultimately forced to resign from her position as Chaplain all implicate the University's prerogative to make unfettered employment decisions concerning one of its ministers. Unfortunately for Plaintiff, it matters not whether Gannon's decisions were wise, misguided, or otherwise in compliance with Title VII. Under the ministerial exception, it is the decision itself which is exempt from review and, consequently, we may not examine the reasons

behind it. *See Werft*, 377 F.3d at 1103; *Alicea-Hernandez*, 320 F.3d at 703.

Plaintiff refers us to *McKelvey v. Pierce*, 173 N.J. 26, 800 A.2d 840 (N.J. 2002), for the proposition that courts must analyze the applicability of the ministerial exception on a claim-by-claim basis. *See id.* at 858-59 (holding that former seminarian, who was the victim of alleged sexual harassment, was not barred as a matter of law from bringing action against diocese and several priests for breach of contract of education; further record development would be permitted on the issue of whether claim could be litigated without offending First Amendment). Plaintiff contends that, even if her Title VII claims are barred by the exception, her common law claims should not be. But our review of Plaintiff's allegations convinces us that the exception must apply to all of her claims.

Plaintiff's breach of contract claim, for example, is premised upon the assertion that the "essential terms" of her contract – i.e., that Plaintiff, as Chaplain, would serve on the President's staff and lead the Chaplain's Division – were breached when Garibaldi removed her from the President's Staff and placed her division under the leadership of Rouch as Vice President for Mission and Ministry. (FAC ¶¶ 90-91.) Plaintiff alleges she was damaged by this breach "in that she was, in fact, removed from her position of leadership based upon her gender rather than her job performance," which resulted in her constructive discharge. (FAC ¶ 92.) Thus, inherent in Plaintiff's contract claim is the theory that Gannon fired her, not because of the manner in which she performed her ministerial functions, but because of her gender. Resolution of these issues would necessarily lead us into an examination of Gannon's motives for the alleged termination of Plaintiff, a

minsiterial employee. Moreover, evaluation of whether Plaintiff was subjected to a *de facto* demotion during her tenure as Chaplain and/or whether she was constructively discharged would likely devolve into inquiries about Gannon's decisions relative to the structuring of assignments among its ministerial employees. These are matters touching too closely upon the church-minister employment relationship and, consequently, we conclude that the First Amendment bars our adjudication of Plaintiff's contract claim as it has been pled. As the *McKelvey* Court recognized: "where an ecclesiastically-based action clearly is present, such as the propriety of a church's *choice* concerning the hiring, termination, relocation, benefits, or tenure of a person whose function . . . concerns the propagation of its faith, the First Amendment shields the religious organization from suit." 800 A.3d at 858 (emphasis in the original). We find that to be the case here.

Plaintiff's remaining state law claims suffer from similar deficiencies. Plaintiff's civil conspiracy claim is premised upon her allegation that the Defendants unlawfully conspired to violate Title VII, and, like the gender discrimination and retaliation claims themselves, it implicates First Amendment concerns about the University's unfettered right to make employment decisions relative to its ministerial employees. Plaintiff's fraudulent misrepresentation and "negligent retention" claims are premised upon the central allegation that Trautman and the other individual Defendants oppressed Plaintiff's civil rights, despite having promised to make employment decisions based upon her job performance. Adjudication of these claims would necessarily involve an inquiry into the University's subjective evaluation of Plaintiff's performance as Chaplain and/or the University's reasons for its

challenged employment decisions In short, we would of necessity have to inquire into Gannon's decisions regarding its own internal management of its ministers. Yet "civil court review of ecclesiastical decisions of church tribunals, particularly those pertaining to the hiring or firing of clergy, are *in themselves* an 'extensive inquiry' into religious law and practice, and hence forbidden by the First Amendment." *Young v. Northern Illinois Conference of United Methodist Church*, 21 F.3d 184, 187 (7th Cir. 1994) (interpreting *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976)) (emphasis in original).

Our conclusion that the ministerial exception bars these claims is in accordance with the holdings of other federal courts faced with similar claims. *See, e.g., Lewis v. Seventh Day Adventists Lake Region Conference*, 978 F.2d 940 (6th Cir. 1992) (First Amendment barred review of minister's claims for breach of contract, promissory estoppel, intentional infliction of emotional distress, and loss of consortium arising out of his termination); *Natal v. Christian and Missionary Alliance*, 878 F.2d 1575 (1st Cir. 1989) (court would not review clergyman's claim of wrongful termination); *Kraft v. The Rector, Churchwardens and Vestry of Grace Church in New York*, No. 01-CV-7871 (KMW), 2004 WL 540327 (S.D.N.Y. Mar. 17, 2004) (former priest's claims for breach of employment contract, tortious interference with employment contract, wrongful discharge, and defamation barred by Free Exercise Clause); *Jacobs v. Mallard Creek Presbyterian Church, Inc.*, 214 F. Supp. 2d 552 (W.D.N.C. 2002) (pastor's breach of contract claim arising from church's investigation of alleged sexual misconduct were barred by First Amendment). *See also Werft*, 377 F.3d at 1100 n. 1 (declining to distinguish between federal and state law claims in application of

ministerial exception; "Just as there is a ministerial exception to Title VII, there must also be one to any federal or state cause of action that would otherwise impinge on the Church's prerogative to choose its ministers.") (citation omitted).

Finally, we acknowledge Plaintiff's concerns that discrimination, in any form, would not be tolerated in civilized society. Plaintiff passionately argues that:

> [t]olerance of gender-based discrimination in the work place has led to sexual exploitation and harassment, which turns women into objects. To allow these behaviors to go unregulated simply because they [sic] employer is a religious entity and the employee is claimed to be a minister is unjustified and perpetuates the very evils Congress sought to eliminate. It is hard to argue that certain conduct is even wrong when churches freely engage in it. This has a tremendous impact on establishing social norms. . . .

(Pl.'s Amended Br. in Opp. to All Def.s' Mot. to Dismiss [Doc. No. 58] at p. 17.)

In rendering this decision, this Court, like others, is "mindful of the potential for abuse" which application of the ministerial exception can invite, "namely, the use of the First Amendment as a pretextual shield to protect otherwise prohibited employment decisions." *Scharon*, 929 F.2d at 363 n. 3 But it bears reiterating that the ministerial exception, though "robust where it applies," *Roman Catholic Diocese*, 213 F.3d at 801, is not without limits and therefore "does not insulate wholesale the religious employer from the operation of federal anti-discrimination statutes." *Id.* For one, the exception does not apply to employment decisions concerning individuals with purely

custodial or administrative functions. *Id.* It has also been found inapplicable in the context of Title VII sexual harassment claims. *See Bollard*, 196 F.3d at 948-50 (holding that former novice could pursue sexual harassment claim against Jesuit Order where defendant was neither exercising its constitutionally protected prerogative to choose its ministers nor embracing the behavior at issue as a protected religious practice).[5] The "saving grace," as one court has noted, "lies in the recognition that courts consistently have subjected the personnel decisions of various religious organizations to statutory scrutiny where the duties of the employees were not of a religious nature." *Scharon, supra*, at 363 n. 3 (citing cases). Moreover,

> the existence of the ministerial exception does not derogate the profound state interest in "assuring equal employment opportunities for all, regardless of race, sex, or national origin." . . . Rather, the exception simply recognizes that the "introduction of government standards to the selection of spiritual leaders would significantly, and perniciously, rearrange the relationship between church and state.'" . . . Application of the exception thus manifests no more than the reality that a constitutional command cannot yield to

[5] We note that while Plaintiff accuses Defendant Rubino of sexually harassing other third parties, she does not claim to have personally suffered any sexual harassment at his hands. Nothing in this opinion necessarily limits the right of a victim of sexual harassment to pursue a Title VII claim against a religious entity. However, Plaintiff's status as an alleged whistleblower does not defeat application of the ministerial exception. *See, e.g., Gellington*, 203 F.3d at 1304 (First Amendment barred minister's Title VII claim premised upon alleged retaliation for his assistance of another employee in pursuing her sexual harassment claim).

> even the noblest and most exigent of statutory mandates.

Roman Catholic Diocese of Raleigh, 213 F.3d at 801 (internal citations omitted).

IV. CONCLUSION

Based upon the foregoing reasons, the Court will grant the Defendants' motions to dismiss this case for lack of subject matter jurisdiction. An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

LYNETTE M. PETRUSKA, Plaintiff v. GANNON UNIVERSITY, et al., Defendants.	Civil Action No. 04-80 Erie

ORDER

AND NOW, this 27th day of December, 2004, for the reasons set forth in the accompanying Memorandum Opinion,

IT IS HEREBY ORDERED that Defendants' Motions [Doc. Nos. 50 and 52] to Dismiss the First Amended Complaint are hereby GRANTED and the claims set forth in Plaintiff's First Amended Complaint are dismissed with prejudice. The Clerk is directed to mark this case "closed."

/s/ Sean J. McLaughlin
Sean J. McLaughlin
United States
District Judge

cm: All counsel of record. [illegible]

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Case No: 05-1222

LYNETTE M. PETRUSKA,

Appellant

v.

GANNON UNIVERSITY; THE BOARD OF TRUSTEES OF GANNON UNIVERSITY; WILLIAM I. ALFORD, II; ROBERT H. ALLSHOUSE; JOSEPH F. ALLISON; MICHAEL P. ALLISON, REV.; JAMES A. BALDAUF; L. SCOTT BARNARD; GEORGE J. BEHRINGER; ARNOLD E. BERGQUIST; LAWRENCE E. BRANDT, REV. MSGR.; ROBERT L. BRUGGER, REV. MSGR.; DONALD M. CARLSON; DANIEL C. CARNEVAL, D.O.; STEPHANIE DOMITROVICH, HON.; THOMAS L. DOOLIN; JAMES J. DURATZ; ANTOINE M. GARIBALDI; THOMAS C. GUELCHER; WILLIAM M. HILBERT, SR.; BRIAN J. JACKMAN; JAMES W. KEIM, JR.; MARY RITA KUHN, SR., SSJ; THOMAS J. LOFTUS; ANNE C. MCCALLION; JOSEPH T. MESSINA; MICHAEL J. NUTTALL; JOHN E. PAGANIE; DENISE ILLIG ROBISON; JAMES J. RUTKOWSKI, JR.; JAMES A. SCHAFFNER; HELEN M. SCHILLING, M.D., D.D.S.; JOHN M. SCHULTZ, VERY REV.; ROBERT J. SMITH, REV. MSGR.; LAWRENCE T. SPEICE, REV. MSGR.; WILLIAM C. SPRINGER; JAMES G. TOOHEY; DONALD W. TRAUTMAN, BISHOP; ANASTASIA VALIMONT, SR. SSJ; RICARDA VINCENT, SR. SSJ; MELVIN WITHERSPOON; ALL OTHER KNOWN AND UNKNOWN MEMBERS OF THE BOARD OF TRUSTEES OF GANNON UNIVERSITY DURING THE TENURE OF DONALD W. TRAUTMAN, as members of the Board of Trustees of Gannon University; DAVID RUBINO, MSGR., in their individual and official capacities; NICHOLAS ROUCH, REV., in their individual and official capacities

(W.D. Pa. No. 04-cv-00080E)

Present: SMITH, *Circuit Judge*

ORDER

It is ORDERED that the mandate issued on October 11, 2006 is hereby recalled. The order denying the petition for rehearing dated October 3, 2006 failed to note, in accordance with 3d Cir. IOP 9.5.8, that Judge Ambro would grant rehearing en banc in the above-captioned appeal. Accordingly, the order dated October 3, 2006 will be amended to include the following statement:

Judge Ambro would grant rehearing by the court en banc.

After the amended order is entered, the Clerk shall reissue the mandate forthwith.

BY THE COURT,
/s/ D. Brooks Smith
Circuit Judge

Dated: October 18, 2006
tyw/cc: C. John Pleban, Esq.
Evan C. Rudert, Esq.
Frank L. Kroto Jr., Esq.
Arthur D. Martinucci, Esq.
Steven W. Fitschen, Esq.
Philip J. Murren, Esq.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Case No: 05-1222

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AMENDED SUR PETITION FOR REHEARING

Present: SCIRICA, *Chief Judge,* SLOVITER, McKEE, BARRY, AMBRO, FUENTES, SMITH, FISHER, VAN ANTWERPEN, CHAGARES, GREENBERG and COWEN, *Circuit Judges**

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied. Judge Ambro would grant rehearing by the Court en banc.

BY THE COURT,

/s/ D. Brooks Smith
Circuit Judge

Dated: October 18, 2006
tyw/cc: C. John Pleban, Esq.
Evan C. Rudert, Esq.
Frank L. Kroto Jr., Esq.
Arthur D. Martinucci, Esq.
Steven W. Fitschen, Esq.
Philip J. Murren, Esq.

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* The votes of the Honorable Morton I. Greenberg and the Honorable Robert E. Cowen are limited to panel rehearing.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Case No: 05-1222

LYNETTE M. PETRUSKA,

Appellant

v.

GANNON UNIVERSITY; THE BOARD OF TRUSTEES OF GANNON UNIVERSITY; WILLIAM I. ALFORD, II; ROBERT H. ALLSHOUSE; JOSEPH F. ALLISON; MICHAEL P. ALLISON, REV.; JAMES A. BALDAUF; L. SCOTT BARNARD; GEORGE J. BEHRINGER; ARNOLD E. BERGQUIST; LAWRENCE E. BRANDT, REV. MSGR.; ROBERT L. BRUGGER, REV. MSGR.; DONALD M. CARLSON; DANIEL C. CARNEVAL, D.O.; STEPHANIE DOMITROVICH, HON.; THOMAS L. DOOLIN; JAMES J. DURATZ; ANTOINE M. GARIBALDI; THOMAS C. GUELCHER; WILLIAM M. HILBERT, SR.; BRIAN J. JACKMAN; JAMES W. KEIM, JR.; MARY RITA KUHN, SR., SSJ; THOMAS J. LOFTUS; ANNE C. MCCALLION; JOSEPH T. MESSINA; MICHAEL J. NUTTALL; JOHN E. PAGANIE; DENISE ILLIG ROBISON; JAMES J. RUTKOWSKI, JR.; JAMES A. SCHAFFNER; HELEN M. SCHILLING, M.D., D.D.S.; JOHN M. SCHULTZ, VERY REV.; ROBERT J. SMITH, REV. MSGR.; LAWRENCE T. SPEICE, REV. MSGR.; WILLIAM C. SPRINGER; JAMES G. TOOHEY; DONALD W. TRAUTMAN, BISHOP; ANASTASIA VALIMONT, SR. SSJ; RICARDA VINCENT, SR. SSJ; MELVIN WITHERSPOON; ALL OTHER KNOWN AND UNKNOWN MEMBERS OF THE BOARD OF TRUSTEES OF GANNON UNIVERSITY DURING THE TENURE OF DONALD W. TRAUTMAN, as members of the Board of Trustees of Gannon University; DAVID RUBINO, MSGR., in their individual and official capacities; NICHOLAS ROUCH, REV., in their individual and official capacities

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SUR PETITION FOR REHEARING

Present: SCIRICA, *Chief Judge,* SLOVITER, McKEE, BARRY, AMBRO, FUENTES, SMITH, FISHER, VAN ANTWERPEN, CHAGARES, GREENBERG and COWEN, *Circuit Judges**

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

/s/ D. Brooks Smith
Circuit Judge

Dated: October 3, 2006
CLW/tyw/cc: C. John Pleban, Esq.
Evan C. Rudert, Esq.
Frank L. Kroto Jr., Esq.
Arthur D. Martinucci, Esq.
Steven W. Fitschen, Esq.
Philip J. Murren, Esq.

---

* The votes of the Honorable Morton I. Greenberg and the Honorable Robert E. Cowen are limited to panel rehearing.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 05-1222

LYNETTE M. PETRUSKA,
Appellant

v.

GANNON UNIVERSITY; THE BOARD OF TRUSTEES OF GANNON UNIVERSITY; WILLIAM I. ALFORD, II; ROBERT H. ALLSHOUSE; JOSEPH F. ALLISON; MICHAEL P. ALLISON, REV.; JAMES A. BALDAUF; L. SCOTT BARNARD; GEORGE J. BEHRINGER; ARNOLD E. BERGQUIST; LAWRENCE E. BRANDT, REV. MSGR.; ROBERT L. BRUGGER, REV. MSGR.; DONALD M. CARLSON; DANIEL C. CARNEVAL, D.O.; STEPHANIE DOMITROVICH, HON.; THOMAS L. DOOLIN; JAMES J. DURATZ; ANTOINE M. GARIBALDI; THOMAS C. GUELCHER; WILLIAM M. HILBERT, SR.; BRIAN J. JACKMAN; JAMES W. KEIM, JR.; MARY RITA KUHN, SR., SSJ; THOMAS J. LOFTUS; ANNE C. MCCALLION; JOSEPH T. MESINA; MICHAEL J. NUTTALL; JOHN E. PAGANIE; DENISE ILLIG ROBISON; JAMES J. RUTKOWSKI, JR.; JAMES A. SCHAFFNER; HELEN M. SCHILLING, M.D., D.D.S.; JOHN M. SCHULTZ, VERY REV.; ROBERT J. SMITH, REV. MSGR.; LAWRENCE T. SPEICE, REV. MSGR.; WILLIAM C. SPRINGER, JAMES G. TOOHEY; DONALD W. TRAUTMAN, BISHOP; ANASTASIA VALIMONT, SR. SSJ; RICARDA VINCENT, SR. SSJ; MELVIN WITHERSPOON; ALL OTHER KNOWN AND UNKNOWN MEMBERS OF THE BOARD OF TRUSTEES OF GANNON UNIVERSITY DURING THE TENURE OF DONALD W. TRAUTMAN, as members of the Board of Trustees of Gannon University; DAVID RUBINO, MSGR., in their individual and official

capacities; NICHOLAS ROUCH, REV., in their individual and official capacities

---

(D.C. Civ. No. 04-80)

SUR PETITION FOR REHEARING

Present: SCIRICA, *Chief Judge,* SLOVITER, McKEE, RENDELL, AMBRO, FUENTES, SMITH, FISHER, VAN ANTWERPEN and CHAGARES, *Circuit Judges*

A majority of the active judges having voted, it is ordered that the petition is GRANTED. The Clerk of this Court is directed to VACATE the judgment of this Court filed May 24, 2006, and to refer the case to the panel for panel rehearing. Because Judge Edward R. Becker has died and circumstances have arisen which require Judge Richard L. Nygaard to recuse, Judge Morton I. Greenberg and Judge Robert E. Cowen, who were selected by random lottery by the Clerk, are assigned with Judge D. Brooks Smith to a panel to rehear and determine the case.

BY THE COURT,

/s/ Anthony J. Scirica
Chief Judge

Dated: June 20, 2006
tyw/cc: C. John Pleban, Esq.
Evan C. Rudert, Esq.
Kenneth W. Wargo, Esq.
Frank L. Kroto Jr., Esq.
Philip J. Murren, Esq.

---

42 U.S.C. § 2000e-1.

Title not applicable to employment of aliens outside State and individuals for performance of activities of religious corporations, associations, educational institutions, or societies

(a) Inapplicability of title to certain aliens and employees of religious entities. This title shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

---

42 U.S.C., § 2000e-2.

(a) Employer practices. It shall be an unlawful employment practice for an employer –

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof

* * *

(2)

No. 06-985

Supreme Court, U.S.
FILED
MAR 21 2007
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

LYNETTE M. PETRUSKA,

Petitioner,

v.

GANNON UNIVERSITY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Petitioner's failure to file her petition for writ of certiorari from the Third Circuit's October 3, 2006 order denying her petition for rehearing within ninety days is saved by the fact that the Third Circuit filed an Amended Order on October 18, 2006, reiterating verbatim the October 3, 2006 denial of rehearing, but correcting the administrative oversight in the original order by adding the notation that Judge Ambro would have granted rehearing by the court *en banc*?

2. Whether, in any event, in the absence of a conflict among the Circuit Courts regarding the ministerial exception, there is any compelling reason for this Court to grant certiorari to upset the principle that Title VII of the Civil Rights Act of 1964, as amended, may not be applied to regulate the relationship between religious employers and their "ministerial" employees?

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent Gannon University is a Pennsylvania not for profit (non-stock) corporation which has no parent company.

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STATUTES INVOLVED

28 U.S.C. § 2101(c): Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after entry of such judgment or decree. A Justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

OBJECTION TO THE JURISDICTION OF THE COURT TO GRANT THE PETITION

On September 6, 2006, the Third Circuit Court of Appeals issued the decision Petitioner seeks to have this Court review. (Appendix to Petition ("App."), p. 1). Petitioner then filed a petition for rehearing, which the Third Circuit denied in a one-sentence Order dated October 3, 2006. (App., pp. 131-32). Because the October 3, 2006 Order had failed to note, in accordance with Third Circuit Internal Operating Procedure 9.5.8., that Judge Ambro would have granted rehearing by the court *en banc*, the Third Circuit, *sua sponte*, issued an October 18, 2006 Order repeating verbatim the first (and only) sentence of the October 3, 2006 Order, adding only a second sentence stating, "Judge Ambro would grant rehearing by the Court *en banc*." (App., pp. 127-30).

Petitioner filed her petition for writ of certiorari in this Court on January 16, 2007, one hundred five days after October 3, 2006. The petition filed by Petitioner is untimely; this Court therefore lacks jurisdiction to hear her appeal under 28 U.S.C. § 1254(c).

STATEMENT OF THE CASE

A. Facts

Respondent Gannon University ("Gannon") is a private, Catholic diocesan university located in Erie, Pennsylvania. Respondent Donald Trautman ("Trautman") is the Bishop of the Roman Catholic Diocese of Erie, and the Chairperson of Gannon's Board of Trustees. Respondent Antoine Garibaldi ("Garibaldi") is Gannon's President. Respondent Monsignor David Rubino ("Rubino") is a priest in the Roman Catholic Diocese of Erie, who formerly served as Gannon's President. Respondent Father Nicholas Rouch ("Rouch"), also a priest in the Roman Catholic Diocese of Erie, is Gannon's Vice President for Mission and Ministry.

Petitioner became Gannon's Chaplain in July of 1999, when Rubino was Gannon's President. Then, and at all times relevant to the matters she complains of in her suit, Petitioner was a member of the religious order of the Sisters of Saint Joseph. In July of 1999, the Chaplain reported to Gannon's President and was a member of the President's Staff, an advisory body. As Chaplain, Petitioner was the co-chair of Gannon's Catholic Identity Task Force. She also held prayer services and was traditionally involved in the planning of liturgical services. In the annual employment evaluation Petitioner attached as an exhibit to her First Amended Complaint, she noted as performance objectives for herself such things as "continue to develop strategies to increase participation in sacramental life of Gannon community," "increase involvement of Catholic Identity Task Force in promoting Catholic identity of university and discussions of Gannon's mission," and "continue to develop faculty and staff as partners in sacramental spiritual mission of

university." Petitioner also supervised campus ministry employees whose duties involved designing, developing and coordinating religious services, programs and pastoral counseling that pertains to advancing the faith, life, spiritual welfare and apostolic formation of the Gannon community.

In or around the summer of 2000, Gannon created the position of Vice President for Mission and Ministry, and Rouch was appointed fill the position. Garibaldi became President of Gannon in July of 2001. In August of 2002, Garibaldi informed Petitioner that, as part of a restructuring of Gannon's administration, the Chaplain would report to the Vice President for Mission and Ministry and would no longer be a member of the President's Staff. Garibaldi directed Petitioner to begin reporting to Rouch at that time.

After Garibaldi informed Petitioner in August, 2002 of the restructuring and directed her to begin reporting to Rouch, she refused to do so. Garibaldi announced the news of the restructuring to the Gannon community at the beginning of October, 2002. Petitioner continued to refuse to report to Rouch. On October 8, 2002, Garibaldi informed Petitioner that if she continued to refuse to report to Rouch, Gannon would take appropriate action. Believing she was about to be terminated, Petitioner submitted her resignation on October 14, 2002.

B. Proceedings Below

On March 11, 2004, Petitioner filed a five-count Complaint against Gannon, thirty-nine specifically named members of its Board of Trustees and "all other known and unknown members of Gannon's Board of Trustees during the tenure of its current Chairman", Trautman (the

"Respondent Trustees"), Gannon's current President, Garibaldi, Gannon's former President, Rubino, and Gannon's Vice President for Mission and Ministry, Rouch, claiming that she had been demoted and constructively discharged. Petitioner named Trautman, Rubino, Garibaldi and Rouch as defendants "in their individual and official capacities." On May 13, 2004, Petitioner filed a First Amended Complaint, in which she added an additional count, for a total of six counts asserted against the Respondents.

Count I of the First Amended Complaint purports to state a claim for gender discrimination against all of the Respondents in violation of Title VII; Count II purports to state a claim for unlawful retaliation against all of the Respondents in violation of Title VII; Count III purports to state a claim for Fraudulent Misrepresentation against Gannon, Rubino and Trautman; Count IV purports to state a claim for Civil Conspiracy against Trautman, Garibaldi and Rouch; Count V purports to state a claim for Breach of Contract against Gannon and Garibaldi; and Count VI purports to state a claim against Gannon and the Respondent Trustees for Negligent Supervision and Retention of Trautman as Chairperson of Gannon's Board, Garibaldi as President and Rouch as Vice President.

Gannon, the Respondent Trustees, and Trautman, Rubino, Garibaldi and Rouch, in their official capacities, moved to dismiss Petitioner's First Amended Complaint for lack of subject matter jurisdiction (Fed. R. Civ. P. 12(b)(1)) and/or failure to state a claim upon which relief could be granted (Fed. R. Civ. P. 12(b)(6)). Trautman, Garibaldi, Rubino and Rouch, in their individual capacities, separately moved to dismiss for lack of subject matter jurisdiction. Following oral argument on the motions to dismiss, the

district court accepted and considered various factual allegations and documents Petitioner submitted in opposition to the motions to dismiss. In a December 27, 2004 Memorandum Opinion and Order the district court granted the motions to dismiss on the basis that the ministerial exception deprived the court of subject matter jurisdiction to hear Petitioner's claims.

Petitioner appealed the district court's decision to the Third Circuit Court of Appeals. On May 24, 2006, the Third Circuit issued an opinion, authored by the late Judge Becker and joined by Judge Nygaard, reversing the district court's dismissal of Petitioner's Title VII discrimination and retaliation claims (Counts I and II of the First Amended Complaint), as well as her civil conspiracy, breach of contract and negligent supervision and retention claims (Counts IV, V and VI) and affirming the dismissal of her fraudulent misrepresentation claim (Count III). Judge Smith dissented from the May 24, 2006 opinion. The Respondents jointly petitioned for rehearing. On June 20, 2006, the Third Circuit granted Respondents' petition for rehearing, *vacated* the May 24, 2006 opinion and judgment and referred the case to rehearing before a reconstituted panel. (App., pp. 133-34). On September 6, 2006, the Third Circuit issued a unanimous opinion, authored by Judge Smith, affirming the district court's dismissal of Petitioner's Title VII discrimination and retaliation claims (Counts I and II), as well as her civil conspiracy and negligent retention and supervision claims (Counts IV and VI) and reversing the dismissal of her fraudulent misrepresentation and breach of contract claims (Counts III and V). In the September 6th opinion, Judge Smith announced that the Third Circuit was joining seven other circuit courts in adopting the ministerial exception and holding that it applies "to any claim, the resolution of which would limit a religious institution's right to choose who will perform particular spiritual functions." *Petruska v. Gannon University*, 462 F.3d 294, 299 (3d Cir. 2006), (App., p. 4).

Petitioner filed a petition for rehearing from the September 6, 2006 opinion and judgment. The Third Circuit denied rehearing on October 3, 2006. (App., pp. 131-32). On October 18, 2006, the Third Circuit, *sua sponte*, issued an Amended order denying rehearing, correcting an administrative oversight that the October 3, 2006 Order failed to note that Judge Ambro would grant rehearing by the court *en banc*. (App., pp. 129-30).

REASONS FOR DENYING THE PETITION

The Petition Was Not Timely Filed, Therefore the Court Lacks Jurisdiction to Hear this Appeal.

A petition for a writ of certiorari intended to bring a judgment in a civil action before the Court for review must be filed within ninety days after the entry of the judgment, unless the time in which to do so is extended by a justice of the Court for good cause shown. 28 U.S.C. § 2101(c). This statutory requirement is reflected in Supreme Court Rule of Procedure 13.1:

> Unless otherwise provided by law, a petition for a writ of certiorari to review a judgment in any case, civil or criminal, entered by a state court of last resort or a United States Court of Appeals . . . is timely when it is filed with the Clerk of this Court within 90 days after entry of the judgment.

The 90-day limit of 28 U.S.C. § 2101(c) is mandatory and jurisdictional; the Court has no authority to extend the time for filing except as Congress permits. *Missouri v. Jenkins*, 465 U.S. 33, 45 (1990). *See also Federal Election Commission v. NRA Political Victory Fund*, 513 U.S. 88, 91

(1994) (Federal Election Commission had no independent authority to file a petition for a writ of certiorari and the Solicitor General's "after-the-fact" authorization did not relate back to the date of the FEC's timely, but unauthorized, filing of the petition, therefore, the Court dismissed the petition for want of jurisdiction).

Where a petition for rehearing has been timely filed in the circuit court of appeals, the Court treats such a petition as tolling the start of the period in which a petition for a writ of certiorari must be filed, until the circuit court denies rehearing or a new judgment is entered on rehearing. *Jenkins*, 465 U.S. at 45 (citing *Department of Banking of Nebraska v. Pink*, 317 U.S. 264 (1942)). That practice is reflected in this Court's Rule 13.3: "[I]f a petition for rehearing is timely filed in the lower court by any party, . . . the time to file the petition for a writ of certiorari for all parties . . . runs from the date of the denial of rehearing. . . ."

Petitioner asserts in her Statement of Jurisdiction that the Third Circuit denied her petition for rehearing on October 18, 2006. That statement is inaccurate and misleading. In fact, the Third Circuit denied her petition for rehearing on October 3, 2006. Although the Third Circuit did enter an Amended Order on October 18, 2006, that subsequent order merely corrected an administrative oversight in October 3rd Order – the failure to include the statement that Judge Ambro would have granted rehearing by the court *en banc*. The initial order of October 3, 2006 clearly held that Petitioner's application for rehearing had been denied. Nothing in the Amended Order of October 18, 2006 changed that denial, nor did it enlarge or contract any rights or duties conferred by the earlier order, or provide any incentive for further review not contained in the original order.

Petitioner filed her petition for a writ of certiorari one hundred five days after October 3, 2006, the date the Third Circuit initially denied her petition for rehearing. The question posed by Respondents in this case is whether the entry of the October 18, 2006 Amended Order extended the period for filing a petition for writ of certiorari by the fifteen days that elapsed between the two orders. Stated otherwise, the question is whether Petitioner's failure to file her petition for writ of certiorari within ninety days from the Third Circuit's October 3, 2006 order denying her petition for rehearing is saved by the fact that the Third Circuit filed an Amended Order on October 18, 2006, where that subsequent order did not change the substance of the initial order.[1]

In *Federal Trade Commission v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206 (1952), this Court squarely addressed the issue of when and how the entry of a second order by an appellate court regarding a prior decree or judgment of that court affects the time for filing a petition for certiorari. In *Minneapolis-Honeywell*, the Seventh Circuit Court of Appeals issued its initial decision on July 5, 1951, reversing part of a cease and desist order issued by the FTC. No petitions for rehearing were filed, but on August 21, 1951, the FTC filed a memorandum requesting that the court enter a decree consistent with the July 5th decision. On September 18, 1951, the court issued what it termed its "final decree", which repeated the provisions of the July 5th decision.

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1. January 16, 2007 was the ninetieth day after October 18, 2007. The ninetieth day after October 3, 2006 was January 1, 2007. The Court was closed on January 1, 2007. The Court was also closed on January 2, 2007 in observance of the National Day of Mourning for the death of former President Gerald R. Ford. Therefore, January 3, 2007 would have been the last date upon which a timely petition for a writ of certiorari from the Third Circuit's October 3, 2006 Order denying rehearing could have been filed.

The FTC filed a petition for certiorari on December 14, 1951, which this Court observed "was out of time unless the ninety day filing period began to run anew from the second judgment entered on September 18, 1951". *Id.* at 210. The Court explained the test to be applied in reaching the answer to that question:

> [T]he mere fact that a judgment previously entered has been reentered or revised in an immaterial way does *not* toll the time within which review must be sought. *Only when the lower court changes matters of substance, or resolves a genuine ambiguity, in a judgment previously rendered should the period within which an appeal must be taken or a petition for certiorari filed begin to run anew.* The test is a practical one. *The question is whether the lower court, in its second order, has disturbed or revised legal rights and obligations which, by its prior judgment, had been plainly and properly settled with finality.*

Id. at 211-12 (emphasis added) (footnotes omitted).

The Court concluded that the Seventh Circuit's September 18th judgment did not meet this test — it simply "reiterated, without change, everything which had been decided on July 5." *Id.* at 212. The Court also rejected the FTC's argument that the Seventh Circuit's use of the word "final" in its September 18th judgment operated to extend the time for filing:

> [W]e think the question of whether the time for petitioning for certiorari was to be enlarged cannot turn on the adjective which the court below chose

> to use in the caption of its second judgment. Indeed, the judgment of July 5 was for all purposes final. It put to rest the questions which the parties had litigated in the Court of Appeals. It was neither 'tentative, informal nor incomplete.'

Id. at 212-13, (footnote omitted). Finally, the Court summarized the rationale underlying the test for determining whether a subsequent order tolls the time for filing a petition for certiorari:

> [W]e do mean to encourage applicants to this Court to take heed of another principle — the principle that litigation must at some definite point be brought to an end. It is a principle reflected in the statutes which limit our appellate jurisdiction to those cases where review is sought within a prescribed period. *Those statutes are not to be applied so as to permit a tolling of their time limitations because some event occurred in the lower court after judgment was rendered which is of no import to the matters to be dealt with on review.*

Id. at 213 (emphasis added)(footnote omitted). *See also Department of Banking of Nebraska v. Pink*, 317 U.S. 264 (1942) (for the purpose of determining the finality required for review in this Court, the test is not whether under local rules of practice the judgment is denominated final, rather it is whether the record of the lower court shows that the order sought to be reviewed has in fact fully adjudicated rights and that the adjudication is not subject to further review; where the order is final in this sense, the time for applying to this Court runs from the date of the order since the object

of the statute [conferring jurisdiction] is to limit the applicant's time to three months from the date finality of the judgment for purposes of review is established. *Id.* at 268.).

Courts have consistently applied the *Minneapolis-Honeywell* rationale to determine timeliness in circumstances where serial decisions have been issued by a lower court. *See, e.g., Keith v. Truck Stops Corporation of America*, 909 F.2d 743 (3d Cir. 1990) (second judgment awarding prejudgment interest adding a significant amount to an earlier judgment was substantive and sufficient to produce a new judgment with a new time for appeal); *Kraft v. United States*, 85 F.3d 602 (Fed Cir. 1996) (revised judgment that corrected the amount of an award in tax refund suit did not constitute a new and significant adverse ruling against taxpayer that would extend the time to appeal).

In this matter, the Third Circuit denied Petitioner's petition for rehearing on October 3, 2006. Thereafter, the court *sua sponte* issued two October 18, 2006 Orders — one explaining the reason for the second, corrective order (App., pp. 127-28) and the October 18, 2006 Amended Order itself. (App., pp. 129-30). The text of the October 18, 2006 order regarding the denial of the petition for rehearing is identical to the October 3, 2006 order.

The finality of the Third Circuit's September 6, 2006 judgment was established on October 3, 2006 when the court denied rehearing. The October 3, 2006 Order was not tentative, informal or incomplete, and it put to rest the question whether the Court would grant rehearing. The October 18th Amended Order did not disturb or revise any legal rights and/or obligations that by the October 3rd Order "had been plainly and properly settled with finality." To the

contrary, the additional sentence in the October 18th Amended Order is immaterial to the issue whether the court would grant rehearing and it does not change any matter of substance or resolve any genuine ambiguity in the clear and unambiguous October 3rd Order. *Minneapolis-Honeywell, supra.*

The Third Circuit's October 18th Amended Order is a perfect example of "an event that occurred in the lower court" after it issued the October 3rd Order denying rehearing that is of no import to the matters to be dealt with on review. The Third Circuit simply corrected an administrative oversight by noting that Judge Ambro would have granted rehearing *en banc*. The statute that limits this Court's appellate jurisdiction, 28 U.S.C. § 2101(c), should not be applied to permit a tolling of its time limitations under circumstances such as these.

The Petitioner Has Not Articulated Any Compelling Reason To Grant Certiorari

It should be noted, also, that beyond the fatal procedural defect of Petitioner's untimely filing, there exists no compelling reason upon which certiorari should be granted. The Circuit Courts of Appeal that have addressed the question of the "ministerial exception" have consistently held that the First Amendment bars employment discrimination claims brought by ministerial employees against their religious employers. Under this jurisprudence, whether the exception applies turns on a factual determination of the employee's role in performing the spiritual and religious functions of the church. The Third Circuit adopted that same rationale in this case and applied it to reach a conclusion that is wholly consistent with the other Circuit Courts. The only potential "conflict" Petitioner can point the Court to on the ministerial

exception is the opinion of the late Judge Becker, which Petitioner presumptuously labels as "*Petruska I*," but which is, in fact, a nullity, having been *vacated* by the Third Circuit and replaced by the very decision Petitioner now seeks to challenge. The pages cited by Petitioner are not part of any bound volume, and are not even available electronically. The fact that "*Petruska I*" was vacated below by the Third Circuit itself is further evidence of the consistency of "ministerial exception" jurisprudence in the lower courts — an additional reason to deny the Petition, not a reason to grant it.

Petitioner aptly points out in her Petition that from the 1972 case of *McClure v. Salvation Army*, 460 F.2d 553, *cert. denied*, 409 U.S. (1972), generally acknowledged as the first to recognize and apply the ministerial exception, to as recently as five months ago (October of 2006) in *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036 (7th Cir.), *cert denied*, 127 S. Ct. 190 (2006), this Court has consistently declined to grant certiorari on the question of the existence or scope of the ministerial exception. (Petition, p. 6 n.1). Since *Tomic*, both the Fifth and Sixth Circuit Courts of Appeal (*Boggan v. Mississippi Conference of the United Methodist Church*, Slip Copy, 2007 WL 412044 (5th Cir. 2007)(unpublished); *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223 (6th Cir. 2007)) have reaffirmed the ministerial exception. No significant legal developments have occurred in the five months since this Court denied certiorari in *Tomic* that would warrant granting certiorari in this case. For this reason alone, certiorari should be denied.

CONCLUSION

Petitioner clearly knew as of October 3, 2006 that the Third Circuit denied her petition for rehearing. Simply put, the Third Circuit's October 18th Amended Order "reiterated, without change, everything which had been decided" in its October 3rd Order. *Minneapolis-Honeywell, supra.* Therefore, this Court must conclude: (i) that the time for Petitioner to file a petition for writ of certiorari in this Court began to run on October 3, 2006; (ii) that the entry of the October 18, 2006 Amended Order did not extend the time for Petitioner to file her petition for certiorari; and (iii) that the petition she filed on January 16, 2007 must be dismissed as untimely.

Respectfully submitted,

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(3)

No. 06-985

IN THE

Supreme Court Of The United States

LYNETTE M. PETRUSKA,

Petitioner,

—versus —

GANNON UNIVERSITY, et al.

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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ARGUMENT

I. THE PETITION FOR CERTIORARI WAS TIMELY FILED

The certiorari petition was timely filed according to the Supreme Court Clerk's Office and under the Internal Operating Rules of the United States Court of Appeals for the Third Circuit. The Respondents rely on case law that is inapposite to this case. The October 18, 2006 order denying rehearing en banc is the dispositive order in this case and, therefore, the proper time from which to calculate the due date for the certiorari petition.

A. The Supreme Court Clerk's Office

In an abundance of caution, Petitioner communicated in some detail with the Supreme Court Clerk's Office on the timing issue significantly before filing the Petition. During a conversation with the Clerk's Office on December 28, 2006, between 11:32 and 11:40 a.m., it was confirmed that the final order from which to calculate the petition's due date was the October 18, 2006 order. Confirming this calculation, the Supreme Court's docket indicates that appeal to the Supreme Court was taken from the rehearing denial of October 18, 2006. Petitioner complied with the Clerk's Office's determination. Thereafter, on January 18, 2007, the Supreme Court Clerk's Office filed the petition as timely consistent with its previous interpretation that the Third Circuit Court of Appeals' October 18, 2006 order was the dispositive order for purposes of calculating the time for filing the Petition. *See* Supreme Court Rule 13(2).

B. Under Third Circuit Rules, the October 3, 2006 Order Is Defective and the October 18, 2007 Order Is Dispositive

The Third Circuit Docket shows that the October 3, 2006 order was procedurally deficient, its mandate was recalled, and the October 18, 2006 order was the basis for the relevant mandate to issue.

The plain language of the Internal Operating Procedures of the Third Circuit deems the October 18 order, and not the October 3 order, "dispositive." Under the Internal Operating Procedures of the Third Circuit, the dispositive order is that containing indication of a dissent from rehearing denial when the dissenting judge requests publication. *See* Internal Operating Procedures of the U.S. Ct. of App. for the Third Cir. R. 9.5.8 (2002) ("If there is a dissent from the denial of rehearing and no dissenting opinion is filed, a notation will be added to the dispositive order, at the affirmative request of the dissenting judge[, who has] directed its publication.").

The October 3 order contained no indication of any dissent from denial. Because only the October 18 order included notification of Judge Ambro's dissent from denial of rehearing, it was the "dispositive" order.

The mandate from the October 3, 2006 order was issued on October 11, 2006. On October 18, 2006, the mandate had to be "recalled" and reissued. The docket states, "[I]t is ordered that the mandate issued October 11, 2006 is recalled. The order denying the petition for rehearing dated October 3, 2006 failed to note, in accordance with 3d Cir. IOP 9.5.8, that Judge Ambro would grant rehearing en banc. Accordingly, the order dated October 3, 2006 will be amended to include the following statement: 'Judge Ambro would grant rehearing by the court en banc.' After the amdended [sic] order is entered, the Clerk shall issue the mandate forthwith, filed." The Amended Order was filed and the mandate

reissued on October 18, 2006. Docket #: 05-1222, *Petruska v. Gannon Univ.* (3d Cir).

The October 3 order was procedurally defective, which required the mandate to be recalled. The October 18, 2006 order cures the procedural defect and, therefore, is the relevant rehearing denial order. This is reflected in the Supreme Court's docket, which indicates that the rehearing denial was October 18, 2006. Therefore, the time for filing the petition for certiorari started on October 18, and ran 90 days. The January 16, 2007 filing occurred 90 days later and, therefore, was timely.

C. The *Honeywell* Decision Is Inapposite

The Respondents rely upon *FTC v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206 (1952), for the purpose of arguing that if there is no substantive change in a lower court's later opinion, an earlier order starts the clock running for the certiorari petition. *Honeywell*, however, is not on point. While the substantive result did not change between the Third Circuit's October 3, 2006, and October 18, 2006 orders, the procedural posture of the case changed, as discussed above. Unlike the earlier order in the *Honeywell* case, the October 3 order in this case was defective. In this case, the mandate had to be recalled and reissued, as distinct from *Honeywell*, where the mandate was unaffected between the first and second orders.

Honeywell further does not control this case, because the two procedural histories before the earlier orders are distinct. The Petitioner in *Honeywell* failed to file any timely rehearing petition and, therefore, this Court treated it as a case that did not involve questions regarding a rehearing petition. 344 U.S. at 210-11. In this case, Petitioner filed timely rehearing petitions following both *Petruska v. Gannon Univ.*, 448 F.3d 615 (2006) ("*Petruska I*"), and *Petruska v. Gannon Univ.*, 462 F.3d 294 (2006) ("*Petruska II*"), and the

rules for rehearing controlled. Under those rules, the October 3 order is defective, and the October 18 order serves as the basis for issuing the mandate and establishes the proper date from which to calculate the timing of the petition. As set forth above, this interpretation is supported by the Clerk filing the Petition for Writ of Certiorari at issue consistent with Supreme Court Rule 13(2), which provides that the "Clerk will not file any petition for writ of certiorari that is jurisdictionally out of time."

II. RESPONDENTS' POINTS SUPPORT GRANTING THE PETITION

Instead of arguing the merits of granting certiorari, Respondents spend the vast majority of their Response on timeliness. With respect to the merits of granting certiorari, Respondents' short, general response does not undermine Petitioner's central point that this Court's guidance is sorely needed in this area of the law. Contrary to Respondents' intent, their reference to this Court's denial of certiorari in recent cases supports the conclusion that such cases will continue to come to this Court until there is adequate clarification, particularly in light of *Employment Division, Dep't of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), and *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), in which this Court held that neutral laws of general applicability (like Title VII) are applicable to religious entities. *See* Respondents' Joint Brief in Opposition to Petition for Writ of Certiorari at 11.

Respondents also fail to rebut the fact that there is confusion in this important First Amendment arena -- where this Court never has provided guidance despite over thirty years of precedent in the lower courts. Both of the cases that Respondents cite as recently "reaffirm[ing] the ministerial exception," Respondents' Joint Brief at 10, reaffirm only the

overbroad interpretation of the ministerial exception that completely bars employment discrimination and retaliation claims against religious and religiously-affiliated employers. *See generally Boggan v. Miss. Conference of the United Methodist Church*, 2007 WL 412044 (5th Cir. 2007) (unpublished); *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223 (6th Cir. 2007).

The Respondents further provide no response whatsoever to the lack of uniformity in the lower courts regarding whether a religious employer can waive or lose the purported "ministerial exception" by expressly representing itself as an "equal opportunity" employer and/or by accepting federal funds conditioned on nondiscrimination. The propriety and scope of the "ministerial exception" remains an important question of federal law that has not been, but should be, settled by this Court.

Respectfully submitted,

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